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THE LAW  
OF  
FREEDOM AND BONDAGE  
IN THE  
UNITED STATES.

BY  
JOHN CODMAN HURD,  
COUNSELLOR AT LAW.

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Moribus antiquis res stat Romana virisque.  
ENNIVS, apud Cic. *de Rep.*

IN TWO VOLUMES.

VOL. I.

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JOHN F. TROW,  
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TO  
MY FATHER,  
THIS WORK,  
THE RESULT OF STUDY  
ALWAYS PROMOTED BY HIS GENEROSITY  
AND INCITED BY HIS SYMPATHY,  
IS GRATEFULLY  
INSCRIBED.



## P R E F A C E .

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ON the publication of a volume whose title indicates its connection with questions arising from the existence of negro slavery in the United States, a recollection of the number and variety of the existing works on that subject will suggest the propriety of some prefatory exposition of the author's point of view.

Although the questions considered in this work are not frequently matters of controversy in courts of law, and derive their principal interest from their connection with objects of more political and public importance than are the litigated rights of private persons, yet it is designed and published as a legal or juristical treatise, or one which, if not technical, may still with strictness be called a "law book." It is intended to present statements of law only, without the introduction of any considerations of the effect of such law on the moral or religious, the social or political interests of the nation or of the several States.

Having this character exclusively, it follows that the proposed work cannot be expected to contain any thing essentially new : simply because, if such, it could not be *law*. The merit of a treatise of this kind must always consist in presenting no proposition without adequate reference or deduction, showing that the same has already been said, or, at least, if not said, has been implied in former juridical expositions.



But the best known propositions, whether of fact or of doctrine, have not always been stated in their proper sequence, or exhibited as coherent or mutually dependent propositions. Whatever novelty may be found in the following pages will consist in the attempted arrangement of well-known facts, or received doctrines of law, connected with the subject, in their proper order ; though, in doing this, it may be made to appear that some propositions which, in the discussion of the subject of slavery under the laws of the United States, are commonly advanced as contradictory or antagonistic, are, in reality, not so.

If successful in being a correct statement of the law on the subject, the proposed treatise cannot be of a partisan character, or cannot be otherwise than impartial in respect to the objects of political parties. For the exposition of existing law is merely the statement of the fact, and is entirely distinct from any approval or disapproval of that law, on grounds of moral or political expediency. This will probably be admitted by all who have made the law to any great extent their study. But the popular manner of treating the subject of slavery may warrant the belief that a very large proportion of those who participate in such discussions would not admit the proposition, and do not ordinarily discriminate between the legal or juristical view of subjects of social interest and other views essentially ethical or political.

The failure to distinguish between the science of law and that of ethics has been common in every country, and manifested in connection with many subjects of social interest ; but never nor in any country more plainly than in this, at the present time, in controversy excited by the subject herein considered. The connection between private rights and public law, which everywhere exists, is particularly visible in the jurisprudence of republican states, and is in this country not merely a matter of

theory, but a constant object of judicial consideration. Where popular sovereignty is recognized and is visibly operative in the form of government ; where law is seen to have its ultimate source in the collective judgment of the community, the individual member of society may the more easily confound law with matter of conscience, and legal inquiry with that investigation by which political or moral ends are to be attained.

In the belief that this tendency arises principally from a want of precision in the definitions of law and in the formulas which express the basal propositions of jurisprudence, the following examination of the laws of the United States affecting personal condition has been commenced by a preliminary exposition of those principles of general jurisprudence which would be necessarily involved in considering the incidents of free condition and its contraries in whatever country they might exist ; and it has been attempted at the same time to discriminate for use in the succeeding inquiry such terms, already adopted by writers of acknowledged reputation, as are requisite to express the necessary distinctions.

Some principles are necessarily assumed without proof ; and when stated, as abstract propositions, without being illustrated by application to cases, only those already familiar with the questions to which they apply can be supposed to perceive their relevancy. The value of the abstract or elementary portions of this treatise may be tested by their attempted application to the practical cases presented in the succeeding portions. It must be confessed that while a great deal of the literature of jurisprudence may illustrate the constant need of such reference to elementary principles and discrimination of language, it will also illustrate the fact that they do not ordinarily receive much attention. And the dictum attributed to Bartolus, "*de verbis non curat Jurisconsultus*," if regarded as the statement of a

fact, is perhaps nowhere better vindicated than where the incidents of bond and free condition have been the topics of legal investigation.

Since it is principally as connected with public or constitutional law that the incidents of free condition and its contraries have been made the subject of legal inquiry, and now excite most discussion, they have, in the greater portion of the following pages, been presented in that connection.

It seems natural to suppose that, in the jurisprudence of every country, that which in its place in the system is most fundamental must also be that portion which is least the subject of legal doubt, or that which may the most easily be ascertained in the harmony of judicial determinations. So it will probably be thought by most persons that in the exposition of any class of private rights and obligations arising under American law the constitutional law connected with the subject, or the meaning and effect of the Constitution of the United States in that connection, especially as determining the political source to which existing rights of private persons are to be referred and on which the continuance of their rights depends, must be the portion of the inquiry giving the least occasion for independent investigation or original reference to elementary principles of construction and interpretation.

But that, in some of the most important questions of constitutional law, the private inquirer cannot so implicitly refer to their determination by judicial opinion, or could not, at least, so lately as the year 1837, might be believed from the strong expressions used by the late Judge Baldwin of the Supreme Court of the United States, in his General View of the Origin and Nature of the Constitution and Government of the United States, &c., &c., commonly cited as Baldwin's Constitutional Views, published in that year. See page 2, where he says, "I

had long been to me a subject of deep regret that, notwithstanding the numerous, consistent, most solemn, and (with some few and mostly late exceptions), to my mind, most satisfactory adjudications of this court [the Supreme Court of the United States], in expounding the Constitution, its meaning yet remains as unsettled, in political, professional, and judicial opinion, as it was immediately after its adoption. If one is to judge of the next, by the results of the past half century, there is but a slight assurance that that instrument will be better understood at the expiration, than it is at the beginning of the period."

And were not the apprehension here expressed well founded, it would generally be felt that the exposition of the fundamental principles of American constitutional law must be as easily attainable by any private writer as is that of the ordinary law of private rights and obligations. An industrious collation of existing judicial decisions should be as sufficient to establish a deduction of the true principle in that department as in any other of our law. Yet, in no portion of juristical literature, does the reader so commonly expect that the author undertaking the exposition should be supported by the prestige of a precedent reputation which may give his views an authority beyond any they could have by being simply impartial deductions from the ordinary elements of legal knowledge: as if it were generally understood that in treatises on constitutional law the writer, instead of relying, as in other departments of jurisprudence, on the force of judicial decisions, should himself enter, more or less, on an independent construction and interpretation of the Constitution, and test the value of the decisions by his own several deduction from the bare text of the instrument.

And, indeed, Judge Baldwin's further observations, in continuation of the passage just cited, indicate that this idea has been countenanced by the practice of the court itself. "It is to

be feared," he proceeds to say, "that unless some mode of interpretation different from what has been usually pursued in argument is adopted, the present uncertainty must become utter confusion. In reviewing the course of argument on both sides in these cases, the remark is fully justified that we have been referred, for the true interpretation of the Constitution, to books, essays, arguments, opinions, speeches, debates in conventions and legislative bodies, by jurists and statesmen, and by some who were neither, which would not be offered or suffered to be read in any court, as entitled to respect, in construing an ordinary act of legislation, or a contract between individuals."

The generous reader will not believe that, in this allusion to the miscellaneous nature of former inquiry in this department, the writer would insinuate an argument for the favorable reception of his own observations on one of the most important subjects of constitutional law. No one can be more sensible that, in proportion to the interest of the inquiry and the deficiency of the ordinary means of attaining juridical certainty must be also the demand for special qualifications in the writer for such investigation, and be more aware of his exposure to the charge of presumption in their absence. The testimony of Judge Baldwin is here adduced not merely as showing that the decisions of the highest courts may not in this matter have been successful as harmonious expositions of the fundamental principles of American public law, but more particularly because in that connection he has maintained the authority of common law as the controlling juridical instrument for attaining a knowledge of the purpose and legal effect of the Constitution of the United States; and because that view is in harmony with the method which has been pursued in the following work. In the place referred to, Judge Baldwin also said, "I have long since been convinced that there are better and safer guides to professional and judicial



inquiries after truth, on constitutional questions, than those which have been so often resorted to without effecting the desired result, a clear and settled understanding of the terms and provisions of an instrument in writing which operates with supreme authority wherever it applies. To me it seems that it can be made intelligible in all its parts by applying to it those established rules and maxims of the common law, in the construction of statutes, and those accepted definitions of words, terms and language in which they had been used and been received, as well known and understood, in their ordinary or legal sense, according to the subject matter. In appealing to the common law as the standard of exposition in all doubts as to the meaning of written instruments, there is safety, certainty, and authority. The institutions of the colonies were based on it," &c., &c. ; and on page 7 of the same, "I know no other guide which is safer, which better conducts the mind to certainty, nor do I feel at liberty to follow any other than the principles of the common law that are well established and applicable to a case arising under the Constitution, and which turns upon its interpretation ; their adoption has been, in my judgment, most clearly made by every authority which can impose the obligation of obedience."

The question indeed will have to be answered, what is common law ? or, rather, what is that common law which is to be made the standard ? This can only be a historical question—a question of fact ; requiring a preliminary examination of the history of jurisprudence, or of laws deriving their authority from those possessors of sovereign power who established the Constitution, or from their political predecessors. And this again involves the recognition of those elementary principles which enter of necessity into the jurisprudence of every country, and by which its origin, continuance, and extent, may be determined ;

and which, in their connection with the subject of free conditions and its contraries, are discriminated in the elementary or theoretical portion of this treatise.

This inclination or practice of deferring to extrajudicial authority in questions of constitutional law far more than is customary in other departments of legal science, must indeed be ascribed in part to the fact that in republican states such questions are always more or less political, as well as legal questions, so much so that, whether they are one or the other, whether they are to be decided by the judiciary or by some other branch of the government—itself a constitutional question—can hardly be decided by either branch alone. It may be thought that the attempt made in the eleventh chapter of this treatise to answer the basal question of our constitutional law, From whom does the written Constitution derive its authority? or, Who are the possessors of sovereign power to whom its existence and continuance is to be ascribed? or, What is the political organization—national or federative—of the United States? is beyond the scope of this treatise, as confined to subjects of legal inquiry only. Yet that the same questions have been frequently objects of judicial consideration, is abundantly illustrated by the reports and in no class of cases, probably, more commonly than those in which the rights of slaveowners under the Constitution have been the subject of controversy. It is however, essentially, a political question, and one which no judicial tribunal whose authority is dependent upon its answer can, in the nature of the case, determine. And that its settlement has not been attained by such decisions is certified by Judge Baldwin in the work referred to on page 36; where, after presenting that view which had been supported by the decisions, and which was his own opinion, he observed, “These considerations, however, have utterly failed to settle the true meaning of the term, ‘*We, the people of t*

*United States,* as the granting or constituent power of the federal government. So far from there being any general assent to that meaning which, to my mind, is so apparent in the Constitution, with its necessary practical results, which its framers and adopters must have known and foreseen to be inevitable, the reverse may be the common opinion."

The question, Who makes the law of the land I live in ? is one which each private person, required to yield obedience in the name of the law, is always supposed to be able to answer for himself, independently of judicial decision. It is the question of allegiance, Who is the actual possessor of sovereign power ? which in most countries is never asked if the decision of a judicial tribunal would be a sufficient answer. That, here, the question is asked and answered by judicial tribunals is the best indication that ours is a constitutional government. But the intrinsic character of the question, as one above law not under law, is still the same, and in saying that in every State of the Union each private person owes an allegiance divided between the State and the United States, there is an implication that he may be obliged to answer the question in circumstances where no judicial decision would be taken for an answer. And in American courts of law, as everywhere else, the answer is to be attained by historical investigation, not by the ordinary juridical standards of judicial determination. No common law even will decide it ; except as history may show from whom common law, public and private, has proceeded. The method, therefore, of inquiry, independently of judicial decisions, which is here pursued, is not inconsistent with that deference to such authority, as the best exponent of *law*, which is professed in the outset.

Of the first two chapters of this work a few copies were published in August, 1856, with the title, *Topics of Jurisprudence connected with conditions of Freedom and Bondage*. And it

may be pertinent to add that the third and fourth chapters were also printed at the same time, though, by the failure of eyesight, the writer was prevented from proceeding with the publication as then intended, and the plan of the remaining portion was afterwards enlarged, in view of considering more fully the questions involved in the case of *Dred Scott* v. Sandford, decided December term, 1856, in the Supreme Court of the United States.

NEW YORK, *August*, 1858.

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[OBSERVATION.—The several chapters of this work, though numbered continuously, may be classified into three parts or divisions. *First*, The Elementary or Abstract Portion, contained in the first and second chapters; *Second*, The Historical Portion, contained in the third and following chapters, to the eleventh, inclusive; and *Third*, The Practical Portion, contained in the remaining chapters of the work. A corresponding arrangement into Books or Parts, such as is sometimes made in the treatises, has not been adopted, from believing that such subdivisions practically diminish facility of reference, and that it will be sufficient to call the attention of the reader to this essential feature in the composition.]

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## CORRECTIONS.

- PAGE 39, note, line 3 from bottom, *for* "the result either," *read*, "either the result."
- Page 75, line 14 from top, *for* "The motives for that practice are immaterial," *read*,  
"The motives which may have actuated the State, in this, are immaterial."
- Page 119, note 1, line 3, *for* "18 East," *read*, "10 East."
- Page 133, note 1, *for* "1 Comstock," *read*, "4 Comstock."
- Page 158, note 2, line 6, *for* "Novell 162, c. 3," *read*, "Novell 156."
- Page 180, line 5 from bottom, *after* "Warkhouse," *insert*, "8 Levinz, 336."
- Page 211, line 6 from top, *for* "captived," *read*, "baptized."
- Page 211, line 5 from bottom, *for* "vontre," *read*, "ventre."
- Page 221, note 1, line 1, *after* "Swedish," *insert*, "or Danish."
- Page 228, line 5 from bottom of the text, *for* "further," *read*, "fuller."
- Page 230, line 19 from top, *for* "1559," *read*, "1659."
- Page 265, note 1, line 8, *for* "restructed," *read*, "restricted."
- Page 285, note 1, *for* "1 Zabriskie's R., 368, 378," *read*, "1 Spencer, 368, and State  
*v.* Post, 1 Zabriskie, 699."
- Page 329, line 13 from top, *for* "laws. No laws," *read*, "laws, no laws."
- Page 344, line 7 from top, *for* "Code Noir," *read*, "Edict of Louis XV."
- Page 349, line 12 from top, *insert* "the," *before* "question."
- Page 362, *for* the numbers of the notes, "3, 4," *read*, "1, 2."
- Page 369, in the note, *dele* 59, *after* R.
- Page 377, line 18 from top, *for* "primitive," *read*, "punitive."
- Page 381, note 2, line 12, *for* "casa," *read*, "casu."
- Page 382, note 2, line 5, *for* "sportunet," *read*, "oportet."
- Page 447, line 9 from bottom, *for* "nature," *read*, "name."
- Page 486, note 1, line 2, *for* "1 Peters," *read*, "7 Peters."
- Page 493, note 1, line 5, *for* "Tuff," *read*, "Tutt."
- Pages 494, 495, *for* "CONCURRENT," in the running title, *read*, "CONTESTED."
- Page 495, note 3, *for* "92, 313; 5 of same, 301, 330," *read*, "92-103, 301-330."
- Page 496, line 1, *for* "two," *read*, "four."
- Page 501, note 1, line 9, *after* "Fitzpatrick," *insert*, "3 Caines, 36, and Foot *v.* Ste-  
vens."
- Page 505, last line in note, *for* "See note," *read*, "(2) See note 1."
- Page 520, line 18 of note, *for* "Bramfield," *read*, "Brownfield."

# THE LAW

## OF

# FREEDOM AND BONDAGE.

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## CHAPTER I

### LAW DEFINED AND DIVIDED—ITS OBJECT, ORIGIN, EFFECT, AND EXTENT.

§ 1. The word *law* has, in common use, two leading significations; one, which is generally considered the *primary* sense—that of a *rule of action*, prescribed by a superior to an inferior; in the idea of which the possibility of action contrary to the rule is implied: the other—a meaning sometimes considered *secondary* to that first given, by a metaphorical use of the word—that of a mode of existence, or of action, excluding the idea of the possibility of action contrary to that mode;—a relation necessary in the nature of the thing existing or acting: whether the co-existence of a superior author or cause of that relation be supposed or not.<sup>1</sup>

§ 2. Every being, existing under conditions over which it has no control, is subject to law in the secondary sense;—therefore, called the law of its nature. The nature of man, or the conditions of his existence, are to him a law in this sense—the law of nature; and, being by this law capable of choice and action, he may also be subject to law in the primary sense.<sup>2</sup>

<sup>1</sup> Brande's Dict., *Law*. Blackst. Com., Introd., sec. 2, note by Christian. Austin: Province of Jurisp., pp. 19, 180, 184. Montesq.: Spirit of L., ch. i.; and De Tracy's Comment. Reddie's Inquiries Elementary &c., pp. 4, 16, 17.

<sup>2</sup> The primary and secondary meanings of the term law must not be confounded

The idea of law in the primary sense implies the relation of superior and inferior ; and the elementary principle in the *science* of law, in this sense of the word *law*, is the existence of the legislator anterior to the law. When the word *law* is applied to rules of action for man, the existence of such a legislator, as to man, must be taken for a fact, or relation, independent of the rule itself ; or as being a principle of the *law* of nature, in the secondary sense of the word *law*.<sup>1</sup>

§ 3. In the various views of the conditions of man's existence—that is, of the law of his nature (law in the secondary sense), which have been advanced by authors who have professed to treat of *jurisprudence*, or the *science of law*, there have been two theories as to the existence of this legislator, or the source of law in the primary sense. According to some authors, the first principle of the science of law is, that man exists in society organized into political states, and that the state is the highest source of *law as a rule of action*.<sup>2</sup> This principle being assumed to be a *law* of nature, in the secondary sense of the term, and the law of nature, in this sense, being considered as the only law of nature which can, in any system of *jurisprudence*, be regarded as having an existence independent of the state.<sup>3</sup>

According to others, there is a law in the primary sense, anterior to the legislation of the state ; by which actions are

with a primary and secondary law ; whether so called in reference to order of time or of authority. Conditions of things are necessarily presupposed in the enunciation of a rule of action, and in this connection the former may be called the primary and the latter the secondary law. Some elementary writers speak of a primary and secondary law of nature. Their primary law being a condition of things—a law in the secondary sense : *e. g.* Bowyer : Univ. Pub. Law, p. 20. Ayliffe's Pandects, pp. 5, 6. Wood's Civil Law, p. 92. Domat : Loix Civ. Traité des Loix, ch. i., § 3.

<sup>1</sup> Reddie's Inq. Elem. &c., p. 16–19.

<sup>2</sup> In illustrating the assertion of this doctrine, writers on jurisprudence usually cite Carneades, *apud* Lactantium, Lib. v., c. 15 ; and Aristippus and Pyrrho, *apud* Diog. Laert., Lib. ii., c. 8 : see Selden, De J. Nat. et Gen. juxta Disc. Eb., ch. 8 ; Rutherf., B. ii., c. 1 ; Pufend., B. ii., c. 8 ; Grot., B. et P. Proleg. 5. But these are only early dogmatisms on one side of a never-ending ethical controversy ; of which more systematic assertions might be found nearer our own day. It is not, in fact, possible to cite any system of jurisprudence or any legislative or juridical authority, ancient or modern, heathen or Christian, which denies the pre-existence of natural justice—the jural character of every rule which is a rule of law ; unless piratical communities and robber feudal barons can be called juridical authority when denying the existence of any law : compare Lieber : Pol. Ethica, vol. i., 231.

<sup>3</sup> Spinoza : Ethica, Pars iv., prop. 37, schol. 2 : Tract. Politici, cap. ii. : Tract. Theologico-Polit., cap. xvi. Hobbes is commonly misrepresented as having denied the existence of natural law otherwise than in this sense.

enjoined, allowed or prohibited, independently of the rule proceeding from the state, and under which, as a law of nature, and a law in the primary sense also, the state is to be considered as existing; which law is to be recognized in jurisprudence as constantly binding on mankind.<sup>1</sup>

§ 4. The questions of the *existence* of natural law,—in the primary sense of the word *law*, of the nature of its injunctions, and of the limits of the power of the state as a source of rules of action for mankind, are questions regarding the nature of man, or of the *law* of his nature, in the *secondary* sense of the term *law*: they are questions of *ethics*,—the science of his nature as a being capable of choice and action in reference to a rule which it is possible for him to disobey; whether they are determined by the precepts of a religious creed, taken to be the revelation of a divine will, or by the dictates of human reason. Whether they also belong to *jurisprudence*, or not, is merely a question of definition: that is, depends on the meaning of *law*, and of *jurisprudence* as the science of law.<sup>2</sup>

§ 5. A law in the secondary sense is spoken of as something which exists absolutely; which necessarily both exists and operates; which is necessarily enforced, if it exists at all; such a law being a *state of things*. But a law in the primary sense—a rule of action, may be supposed to exist without being enforced; or without operating except in creating a moral obligation: because a possibility of action contrary to the rule is implied in the idea of a law in this sense. A law of this kind may therefore be recognized either as a law merely existing, or as a law operating or being enforced.

Now, jurisprudence is taken to be the science of a rule not merely existing, but one which is actually operative or enforced

<sup>1</sup> Lieber: Pol. Ethics, B. I., § 30. Rutherford, B. II., c. 2. Mackintosh: Prog. Ed. Phil., Sect. iv. v.: Grotius: B. et P. Prolegom., §§ 6, 7, 8, 16, and notes. Vattel: c. II., § 1. Aristot.: Rhet., Lib. I., cap. 13 et 15, and various other ancient authorities cited by Selden, De J. Nat. &c., Ebr. Lib. I., ch. vi. Reddie's Inquiries &c., p. 19; also, ch. II., and the citations.

A very recent comparison of the best authors on this point in Bowyer on Universal Public Law, ch. II., III., IV., VII., Vol. 84, of Philad. Law Library.

<sup>2</sup> Comp., Doctor and Student, ch. I., II.

In connection with the subject of this chapter, there will be frequent occasion to recall the maxim of Iavolenus, Dig., Lib. I., Tit. 17, § 202. *Omnis definitio in jure civili periculosa est, parum est enim ut non subverti possit.*

in or by the will of society or the state. The science of what rule *ought* to be made operative by the will of the state is a different thing; it is a science of rules regarded only as existing, whether operative in civil society—that is, enforced—or not.<sup>1</sup>

A rule made operative by the authority of society, or of the state, is a rule identified with the expressed will of society or of the state. The will of the state, indicated in some form of expression, is *the law*,<sup>2</sup> the subject of *jurisprudence*, and no natural rule which may exist, forms a part of *the law* unless identified with the will of the state so indicated. What the state wills is the conterminous measure of law; no pre-existing rule is the measure of that will.<sup>3</sup>

§ 6. But a law in the *primary* sense must be founded on a recognition of the nature of the things which it affects:—that is, of a natural *law* in the secondary sense of the word: for a rule founded on a contradiction of the nature of things is a rule impossible to be executed, or cannot subsist as a rule.<sup>4</sup> Therefore, all laws made for man must recognize some conditions as the conditions of his existence; and hence a recognition of his moral nature, or of a necessity in his nature to regard actions as

<sup>1</sup> Domat includes natural law, derived by *a priori* reasoning, in *the law*—the subject of jurisprudence; and speaks of some rules as being evident without reasoning, and of others which require reasoning to make them evident. Domat: Civil Law. Treatise on Laws, ch. ii., §1—37; and see Bowyer, Univ. Pub. Law, p. 103. In this system, the mind of the individual jurist determines the law; it is his *subjective* apprehension of a rule of action: and only that rule which, in his judgment, the state *ought* to enforce. Chanc. D'Aguesseau approves of Domat's system in this respect: see Œuvres, Tom. I., p. 645–6. Mr. Reddie, Inquiries El. &c., p. 48, says of Kant's *Metaphysische Anfangs Gründe der Rechtslehre*, and Fichte's *Grundlage des Naturrechts*, that “they established in Germany the complete recognition of the distinction between ethics and law, or jurisprudence, between the legality and the morality of human actions.” But Mr. Reddie sometimes speaks of jurisprudence as if it comprehended the science of what ought to be law; see Inquiries El. &c., pp. 24, 25.

<sup>2</sup> Savigny: *Heut. Rom. Recht*, § 7. Tr.: “With reference to this quality of the law, by which it has an actual determined existence in reference to any given state of things in which it may be appealed to, we call it positive law.”

<sup>3</sup> Molloy *de Jure Marit.* B. iii., c. 9, § 1, 2. Pufendorf, B. i., c. 6, § 1. Co. Lit. fo. 97, b. Lieber: *Pol. Eth.*, vol. I. p. 98, 249. “Law is the direct or indirect, explicit or implied, real or supposed, positive or acquiesced in expression of the will of human society represented in the state; or it is the public will of a part of human society constituted into a state.” Compare *Encyc. Am.*, vol. vii., Append. Law, &c., by Judge Story.

<sup>4</sup> Dig. Lib. I., Tit. 17, § 186. *Quæ rerum natura prohibentur nulla lege confirmata sunt.* Co. Lit., 92 a. “Lex spectat naturæ ordinem, the law respecteth the order and course of nature. Lex non cogit ad impossibilia. The law compels no man to impossible things. The argument *ab impossibili* is forcible in law. Impossibile est quod naturæ rei repugnat.”

being right or wrong, is necessarily made, as the recognition of a fact, in the act of prescribing a law for him founded on the idea of distinguishing between actions as right or wrong, or on the existence of a moral obligation in the rule; that is, an obligation founded on his *nature*, and also resulting from a law in the primary sense.<sup>1</sup> Now, since, in point of fact, all laws, enjoined by society or the state, have been founded on this idea, the law prescribed by the state recognizes the existence of a natural law in the *primary* sense of the word *law*.<sup>2</sup>

§ 7. But since the state makes this acknowledgment of natural law by classifying or distinguishing certain actions as actions to be done or not to be done, as permissible or not permissible,<sup>3</sup> it so far interprets this law of nature by asserting it

<sup>1</sup> Whewell: Elements of Morality, including Polity, B. i., c. 4, 90. "Rights are not law only nor justice only, (meaning by law the law of society, and by justice that which is right,) they are both Law and Justice; Law, because Justice; Justice expressed in Law;" and see the same, §§ 105, 106, 107. Lieber: Pol. Eth., B. ii., § 81. "The state, I said, is founded on the relations of right; it is a *jural* society, as a church is a religious society, an insurance company a financial association; the idea of the just, and the action founded upon the idea called justice, is the broad foundation and great object of the state." The same, §§ 33, 35: "The state being a *jural* society, and rights being imaginable between moral beings only, it follows that the state has likewise a moral character, and must maintain it." The word *jural* is also employed by Whewell, B. i., c. 4, 90: "By the adjective *jural* we shall denote that which has reference to the doctrine of rights and obligations; as by the adjective *moral* we denote that which has reference to the doctrine of duties." And therefore, the state, in establishing coercive rules of action, acts *juridically*. The term *juridical* is commonly used as if synonymous with *judicial*. A tribunal in acting judicially, necessarily, also acts *juridically*: that is, declares what is justice or right. But the state, when it promulgates laws, promulgates them as rules of right. The word *juridical* will herein be employed to designate the declaration of *law*, whether made by the legislative or the judicial function.

The term *juridical* is sometimes used to designate the province of the private jurist: the proper word for which is *juristical*, (*Ger. juristisch*.) A society of jurists in England have called themselves "the juridical society." In the French version of Falck's *Juristische Encyclopedie*, translated *Ency. Juridique*, vii., note, it is said: "nous avons ordinairement traduit l'adjectif allemand *juristisch* par *juridique*, quoique le mot français signifie, dans l'usage plutôt ce qui se rapporte à la *jurisdiction* que ce qui se rapporte au *droit*. Nous aurions pu souvent le remplacer par *légal*, mais comme il est nécessaire, surtout dans un exposé de principes, de ne pas confondre le *droit* et la *loi*, nous avons évité d'employer l'un pour l'autre, *juridique* (repondant à *juristisch*, *rechtllich*) et *légal* (repondant à *gesetzlich*.)"

<sup>2</sup> Reddie's Inquiries Elem. &c., p. 9, 58. There are noble passages in the writings of Cicero, and others, which are frequently cited by authors who base *jurisprudence* upon *natural law*; (e. g. Cic. De Rep. iii., 22—the passage given by Lactantius, Inst. vi., 8; Demosthenes Or. contra Aristogit. i.) Whether they have been used to the purpose depends entirely on the definitions assumed for these words. Their force differs essentially as they are used either in a legislative or a judicial point of view.

<sup>3</sup> Hobbes: Leviathan, De Civitate, c. xxvi. De legibus civilibus. "Legem igitur civilem sic definio: lex civilis unicuique civi est regula qua civitas verbo scripto, vel alio quocunque voluntatis signo idoneo, ad distinctionem boni et mali uti imperat."

Ency. Am., vol. vii., p. 581. Appendix by Judge Story: "By a law we understand

to be accordant with those distinctions.<sup>1</sup> The maintenance of those distinctions being, therefore, the will of the state, those whom it appoints to carry out its will are bound, from their relations to the state, to accept and enforce those distinctions, as the criterion of the law of nature. Judicial tribunals constituted by the state, must, therefore, in interpreting *the law*, receive these distinctions as the exposition of the law of nature, and as the highest rule to which they can refer. The natural law is included in *the law*, in this ordinary sense, only so far as *the law* is the judgment of the state upon what shall constitute right or wrong action; and it is immaterial, for the judgment of the subordinate tribunals, whether the jurisprudence which they have to interpret is considered to admit, in theory, the existence of natural law, or to refer all rules of action to the authority of the state; since, supposing it to admit the pre-existence of natural law, as a rule of action, it assumes the interpretation of it, given by the state, to be the guide for legal decision.<sup>2</sup>

a rule prescribed by the sovereign power of a state to its citizens or subjects, declaring some right; enforcing some duty, or prohibiting some act."

<sup>1</sup> This recognition of moral obligation in jurisprudence is entirely independent of the foundation of that obligation, as a question of Ethical Philosophy. It is immaterial in jurisprudence whether the law of nature is called "moral sense; common sense; understanding; rule of right; natural justice; natural equity or good order; truth; doctrine of election; repugnancy to nature," or any such term. Bentham, in quoting these various denominations of the law of nature, asserts the propriety of his own favorite term, "the law of utility," or "greatest happiness principle:" which is equally vague, as the description of a rule of action, until some legislator is assumed to exist, who shall determine what is *useful*, or what is the *greatest happiness*. See Bentham's *Morals and Legislation*, ch. ii., 14, note. And compare Austin: *Prov. Jurisp.*, p. 188; note, p. 174; Austin being of the same ethical school. Also, Reddie's *Inquiries Elem. &c.*, 2d ed., p. 54—72. Utility has, in fact, always been recognized in juridical action as an exponent of what the law ought to be. See the same, p. 73; and that there is herein no real inconsistency, see Mackintosh: *Progress of Ethical Philosophy*.

<sup>2</sup> 2 Dodson's *Adm. Rep.*, The *Le Louia*, 247. Speaking of the slave-trade, Lord Stowell says: "I must remember that, in discussing this question, I must consider it, not according to any private moral apprehensions of my own, (if I entertained them ever so sincerely,) but as *the law* considers it." . . . (p. 249): "An act must be legally criminal—I say *legally* criminal because neither this court nor any other can carry its private apprehensions, independent of law, into its public judgments on the quality of actions. It must conform to the judgment of the law upon that subject; and acting as a court in the administration of law, it cannot impute criminality to an act where the law imputes none. It must look to the legal standard of morality."

Hobbes: *Leviath.*, c. 26—"Leges naturæ et leges civiles in eadem civitate se mutuo continent." Massé *Droit Commer.*, Tom. i., 42. Scaccia *Tractat. de Commer. Quæst.*, VII., Par. ii., Ampl. 13, § 4, 19. Hegel, *Grundlinien der Philosophie des Rechts*,



§ 8. Since the power of the state, or of society, is assumed by the state to be the result of natural law in the signification either of a necessary condition or of a rule, the only natural principles, which the *law* can recognize as such, are those which admit the existence of society, as natural; and no principles can form a part of it which are founded upon a supposed state of nature, anterior or opposed to society, or on the supposed law of such a state, as being the true law of nature.<sup>1</sup>

§ 9. The actual conditions of human existence have divided mankind into separate communities or states, each called *sovereign*, because each exercises, independently of the rest, those powers of society which are essential to the purposes of such separate existence.<sup>2</sup>

The rules of action prescribed by any single sovereignty or state are known to the individuals under its dominion as the *law*, in the ordinary sense (in contradistinction to ethics); or *national law* (commonly termed in English, municipal),<sup>3</sup> as

§ 212: "Im positiven Rechte ist daher das was gesetzmässig ist, die Quelle der Erkenntnis dessen was *Recht* ist, oder eigentlich, was *Rechtens* ist:—"

This proposition is almost untranslatable from the want of an English word corresponding with the German *Recht*, Latin *Jus*, French *droit*. *Law* being used not to designate that only but what is meant by the Ger. *Gesetz*, Lat. *lex*, Fr. *loi*. (Lieber's Pol. Eth., sect. 80, n.). The passage is equivalent to:—In law—the rule identified with the will of the state, that which is legal, or according to law, (*lex, loi, Gesetz*,) is the means of ascertaining that which is the rule of right—the *jural* rule, *jus, droit, Recht*:—and not *vice versa*.

The American Literature on the Slavery question affords numberless instances, in which the converse of this proposition is made the foundation of the argument.

<sup>1</sup> Spinoza: Tractatus Politici, cap. ii., 15. Domat: Loix Civ. Tr., ch. ii., § 2. Cousin: Introd. Hist. Philo., p. 11: "In the place of primitive society, where all things were in confusion, man created a new society upon the basis of one single idea, that of justice. Justice established constitutes the state. The use of the state is to cause justice to be respected by means of force. \* \* \* Hence arises a new state of society, civil and political society, which is nothing less than justice acting by means of that legal order which the state represents."

Professor Foster's Introductory Lecture before the London University. Law Magazine, N. Y., Feb. 1852. "If asked, therefore, to explain the expression employed at the outset—natural law,—the answer would be, that portion of moral obligation which is enforceable by public authority." Comte: Tr. de Legislation, Liv. i., ch. 6. Compare Calhoun, A Disquisition on Government; Works, vol. i., p. 58.

<sup>2</sup> A fact assumed in every system of jurisprudence. Comp. Lieber: Pol. Eth., B. ii., § 61. Bla. Com., vol. i., Introd., p. 42.

<sup>3</sup> This portion of the subject of jurisprudence is ordinarily denominated *municipal law* by English writers. Blackstone (Comm. I., Introd., p. 44) is most commonly cited as authority for its use: but it was employed by English lawyers long before his time, (see L. Vaughan, R. 191, anno 17, Car. ii.,) to signify the law of any one state or nation; or, what is commonly called "the law of the land." According to the analogy of the languages of Continental Europe *municipal law* would imply the local law of some political body less than a state or nation—the law of a *municipium*, a town or



proceeding from the authority of a single polity or state, and having effect only within the territorial limits of its dominion. These rules may or may not be consistent with the law of nature, or true principles of ethics, but in being prescribed by the highest power within the limits of such state, and constituting the judgment of such power on the principles and effect of natural law, they must be taken, within those limits, in all legal or judicial considerations, as the highest rule of action.

§ 10. Since the whole variety of human interests and action cannot, from their nature, be distinctly divided among and included under the limits of different states,<sup>1</sup> the powers of society, in reference to such interests and action as are beyond the separate control of single states, can only be exercised among states recognizing no superior among themselves, by a united, or reciprocal reference to principles of antecedent authority and universal obligation. They must, therefore, refer to the conditions of man's existence (a law in the secondary sense), and to human reasoning in regard to those conditions, as giving the only law (independent of agreements which themselves rest on that law for their obligation) which can be recognized as a rule of action and one of natural origin—an origin distinct from their own juridical will. But because they recognize no superior among themselves in determining that law of nature, the only exposition of it which can have *legal* force—that is, a force like

city, or at most, of a province. For a justification of this use of the term *national law*, compare Bentham's *Morals and Legislation*, ch. xviii., 26. Reddie's *Inquiries &c.*, pp. 93, 94, 236, and the same author's *Historical View of the Law of Maritime Commerce*, p. 1.

With jurists who have used the Latin language, *jus civile* is employed as the equivalent of that which is here denominated *national law*, as by Grotius, B. et P. Proleg., § 1: "*Jus civile, sive Romanum, sive quod omni patrum est*" &c., and compare Hobbes' definition of *jus civile* (ante § 7, n.) The term has generally the same force with the classical Roman jurists: but it was also sometimes used by them in other senses, as will be shown hereafter, (ch. iv.,) and compare Smith's *Dict. Antiq.*, *Jus*. The name "civil law" cannot well be given to that which is here called *national law*, since it is already used to indicate the Roman law, or the Roman law as generally received in Europe, in contradistinction with English common law, and is also employed to designate that portion of the law which does not include punitive, or the so-called "criminal" law.

<sup>1</sup> Bowyer: *Univ. Pub. Law*, p. 189: "For it is impossible to confine the effects of municipal laws absolutely within the territories of each state; and, therefore, the laws of different countries have points of contact which arise from the general intercourse of mankind, and may be looked upon as a necessary part of the scheme of laws which regulate the world, divided as it is into independent nations and sovereignties."

that of *the law*, in the ordinary sense, as above defined—must be that which has been allowed by such states; each constituting an independent authority in ascertaining the true principles of that law.<sup>1</sup>

From this mutual acknowledgment of principles of natural law, and the agreement of sovereign states founded on them, arises that which is properly called *international law*, in respect to its objects and jurisdiction, but oftener, perhaps, the “law of nations:” a name usually taken to be more appropriate because the term may mean either a law of which nations are the authors, or one of which nations are the subjects. And, indeed, this law limits in some respects, and in others extends, the action or authority of separate nations and sovereignties; but while it derives its force and origin mainly from principles necessarily acknowledged among nations as having the character of a pre-existent natural law, it still is made to have the effect or actual force of law by the action of those nations, since each claims an equal right to define or interpret the supposed natural law, equivalent to equal power of legislation.<sup>2</sup>

§ 11. When this international law or law of nations is viewed as a rule of conduct between nations or states as the subjects of

<sup>1</sup> 7 Cranch, 186–7. Marshall, J. Bentham (Morals and Legisl., c. 19, § 2) proposed to use international law in this sense, following D’Aguesseau, (Œuv., T. i., p. 445,) writing, 1757. and Dr. Zouch, 1650, who distinguished *jus inter gentes* from *jus gentium*; see Reddie: Elem. International Law; Wheaton’s I. L.; Wildman’s Institutes of do.; Foelix, Droit International Privé, § 1.

Bl. Com., B. I.: Intro., p. 43, B. iv., 67. Suarez: De Legibus, etc., Lib. ii., c. 2, 9. “Nunquam enim civitates sunt sibi tam sufficientes quam indigeant mutuo juvamine et societate, interdum ad majorem utilitatem, interdum ob necessitatem moralem. Hac igitur ratione indigent aliquo jure quo dirigantur et recte ordinentur in hoc genere societatis. Et quamvis magna ex parte hoc fiat per rationem naturalem non tamen sufficienter et immediate quoad omnia, ideoque specialia jura poterant usu earundem gentium introduci.” Whewell: EL. of Moral. &c., B. II., ch. vi., § 214. “But the general rules and analogies of natural *Jus* lead to determinations of the rights and obligations of nations which form a body of acknowledged law. This body of law is *Jus inter gentes*, and may be termed—International *Jus*.”

<sup>2</sup> Pufendorf: Droit de la Nat. et des Gens, l. 2, c. iii., § 7. Grotius: B. et P. Proleg., § 17. “Et hoc jus est quod gentium dicitur, quoties id nomen a jure naturali distinguimus.” Grotius here refers to *international law*, the law of which nations are the subjects, and arises from their consent—“ita inter civitates, aut omnes aut plerasque, ex consensu jura quædam nasci potuerunt”—in the same section, defining this *jus gentium*. In other places, Grotius speaks of the term *jus gentium* as being used for what he calls *jus naturale*, as ch. i., § 14—“jus naturale, quod ipsum quoque gentium dici solet;” in same chapter, § 11, 1, he notices the distinction made in the Roman law between *jus naturale* and *jus gentium*, considering it as out of use, “usum vix ullum habet.” The necessity of preserving each of these significations of *jus gentium* will be shown hereinafter in this chapter and in the second.

that law, and is compared with the municipal law of any one of those states in reference to the relation of superior and inferiority which is a pre-existent condition of law in the sense of a rule of action: or, in other words, when its *authority* is compared with that of the municipal (national) law of any one state as a rule of action within its own dominion or national limits, it is at once seen that the international law, in this point of view, is not strictly a *law*; since the mutual independence of nations precludes the idea of that relative superiority and inferiority. It is only a rule of moral obligation for nations or states in their political existence.<sup>1</sup> But so far as this international law affects the actions of individuals, and is enforced by the authority of some state, it becomes a law in the strict sense, and at the same time becomes identified with municipal law, in becoming a part of the law enforced by a state within its own domain or national jurisdiction.

§ 12. It is only, therefore, as a law *between* states, as its subjects, that international law has a separate existence from municipal law: and in this application of the international law receives the name of a law only by way of analogy: that is, it is only analogous to a law in the proper sense. When international law is enforced by some state within its own national limits, as a law in the strict sense, it is then distinguished from the municipal law only by its having a different application and effect. Its legal authority, whenever it acts as a law in the proper sense, is identified with that of some municipal (national) law, or the law prevailing, territorially, under the exclusive dominion of some nation.<sup>2</sup>

§ 13. The distinction thus made in the law, of being international and municipal, indicates, at the same time, the various nature of its jurisdiction, or the variety in the objects and interests which it affects, and the difference in the nature of origin, as either in the associated or separate authority of nations or states. And, though this distinction is not founded upon

<sup>1</sup> Rayneval: *Instit. du droit de la nature et des gens*, note 10, du 1 Liv., p. 1. Wheaton: *Internat. Law*, p. 17. D'Aguesseau: *Œuvres*, Tom. I., p. 445.

<sup>2</sup> Reddie: *Histor. View L. of Marit. Com.*, p. 24. Hence called by Austin: *Philos. Jurisp.*, p. 207, a law of "positive morality."

<sup>3</sup> Reddie's *Inquiries in International Law*, 2d ed., p. 412, 466.

difference in the origin of the law, as being in part derived from natural principles, or principles of ethics, and in part from the will of society, neither does it imply a denial of the moral foundation of either of these divisions of the law in the obligation of natural rules of action. On the contrary, each of these manifestations of the power of society rather asserts their existence and authority: justifying that power on the ground that those rules are made efficacious by such manifestation.<sup>1</sup>

The international law, otherwise called "the law of nations," in the sense of a rule of which states are the subjects, as well as the municipal law of any one state, may or may not be consistent with the true dictates of natural reason, or what ought to be received among all nations as natural law. Each of these divisions of the law has changed, while constantly claiming to agree with those principles. Whatever may have been the speculative opinions of philosophers, natural law, or right, has always been confessed by states and jurists to exist, and to be of constant obligation;<sup>2</sup> but has had effect as *law*, in the sense of the subject and guide of judicial decision, only so far as acknowledged by sovereign powers, nations, or states.

§ 14. It is not here denied that the true law of nature, the unchangeable dictates of just reason, being, by the supposition, co-existent with the nature of man, must be constantly binding on all mankind, independently of the provisions of human law.<sup>3</sup> The nature of the mind being such that man is capable of moral choice independently of all earthly power.<sup>4</sup> The agreement of the human law with the natural or divine precepts must in each case be a question which each person, subject to both, must determine in his own conscience for himself; though the human law may not allow his decision to have any practical effect in

<sup>1</sup> Compare, on this question, Phillimore: *Internat. Law*, Introduction, and ch. iii.

<sup>2</sup> Lieber: *Pol. Eth.*, B. i., § 39, 40, 41. Bowyer: *Univ. Public Law*, ch. iv. Reddie's *Inquiries Elem. &c.*, p. 9, 58.

<sup>3</sup> Austin: *Prov. of Jurisp.*, p. 280, n. 4. "All the older writers on the so-called law of nations incessantly blend and confound international law as it is, with international law as it ought to be; with that indeterminate something which they suppose it would be, if it conformed to that indeterminate something which they style the law of nature."

Von Martens was the first writer who pointed out the necessity of avoiding this confusion. See Martens: *Law of Nations*, ch. i. Reddie: *Inq. in International Law*, ch. ii.; and Austin, continuation of note cited.

<sup>4</sup> Lieber's *Pol. Eth.*, B. iv., c. 2.

excusing a violation of its own provisions ; it being essential to its own existence that it should itself decide as to such agreement, and enforce its own commands without regard to any other judgment. And in this respect it is immaterial whether the individual opposes to the will of the state his single judgment of the natural law, or refers to a recognized body, or church, as authoritative in such questions. The authority of such church in matters of *law*, resting on its being supported by, or identified with, the supreme power of the state ; and in the absence of such identification, acting on the individual by his voluntary choice, or the judgment of his conscience.<sup>1</sup>

§ 15. Municipal law, according to Blackstone's definition, is "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong." The latter clause of this definition has been criticised as superfluous, if that be right which the supreme power may call such ; or inconsistent, in denying the supremacy of that called supreme, by implying another legal criterion of right than its own judgment. And in Blackstone's analysis of this definition, speaking of "the declaratory part"—"declaring what is right, and prohibiting what is wrong," he says, "it depends not so much upon the law of revelation or of nature as on the will of the legislature."

The supreme power in the state must necessarily be absolute, in being subject to no judge.<sup>2</sup> It may give to its own will the name of right, and enforce it as law ; but as the essential conditions of man's nature, and the ends of society, must always be the same,—to support which states exist, a violation or denial of their existence would be to the same degree a destruction of the basis of the state, and would free the individual subject from the obligation of obedience. The limits of the definition are a question of political ethics rather than any part of a view of the *law* ; which should be a statement of *what is*, rather than

<sup>1</sup> D'Aguesseau : Œuv., Tom. i., p. 688. There are, of course, many writers who might be cited against this view. Compare Bowyer's Univ. Pub. Law, p. 73—87. Bunsen's Signs of the Times, ch. v.

<sup>2</sup> Lessee of Livingston v. Moore and others, 7 Peters R., 546. Johnson J.—"The power existing in every body politic is an absolute despotism." Paley : Mor. and Pol. Phil., B. vi., c. 6. Bodin : Repub., B. i., c. 8. Austin : Prov. Jur., p. 295.

of *what ought to be*;<sup>1</sup> for which purpose the abridged definition is comprehensive enough—"municipal law is a rule of action prescribed by the highest power of a state;"<sup>2</sup> not regarding it as capable of being wrong: that is, not judging it by any rule out of itself.<sup>3</sup>

§ 16. The supreme power of a state, or, more correctly, the person or persons holding that power, may always claim to interpret their own legislation by a reference to natural law, as having been always the guide and exponent of their intention. And in every sovereign nationality this power must exist, and be somewhere vested. Such interpretation from the source of the law is practically identified with the sovereign act of legislation. But the administrators of the law, as subordinates of this sovereign power, or of its possessors, either executive or judicial, cannot assume to themselves the right of annulling, by a decision under the law of nature appealing to their consciences, the decrees of that sovereignty which gives them their powers, and determines the limits of their judgment.<sup>4</sup> And where, by the law of that sovereign will, the ordinary course of legislation is delegated to limited governments, the possessors of legislative power cannot alter the limits assigned to them on grounds derived from the law of nature.<sup>5</sup> So far, however, as the supreme power adopts the natural law in the expression of its own will, and, which is essential to such adoption, refers to a settled interpretation of it, it becomes municipal, or international law, and the rule for private action and judicial decision.<sup>6</sup>

<sup>1</sup> *Quid sit iuris, non quid sit justum aut injustum.* Austin: *Prov. Jur.*, p. 276.

<sup>2</sup> Kent's *Comm.*, Lect. xx., *pr.* "Municipal law is a rule of civil conduct prescribed by the supreme power of a state."

<sup>3</sup> Co. Lit., fo. 110, a: Of the power of Parliament, "*Que il est de tres grand honor et justice, et que nul doit imaginer chose dishonorable*:" cites Pl. Com., 398, b. Doctor and Student, ca. 55, fol. 164. Compare a summary of various authorities on this point in *Comment. on Const. and Stat. Law*, by E. F. Smith, ch. vii.

<sup>4</sup> Bacon's *Essays*, 57. *Calder v. Bull*, 8 Dallas, 398. Kant's *W.*, vol. i., *Essay on the Faculties*.

<sup>5</sup> Fortescue: *de Laudibus*, ch. xiii.

<sup>6</sup> Austin: *Prov. of Jurisprudence Determined*, p. 173. "The portion of the positive law, which is parcel of the *law of nature* (or, in the language of the classical jurists, which is parcel of the *ius gentium*) is often supposed to emanate, even as positive law, from a divine, or natural source. But (admitting the distinction of positive law into law natural and law positive) it is manifest that law natural, considered as a portion of positive, is the creature of human sovereigns, and not of the Divine monarch.

§ 17. If natural law were to be recognized in jurisprudence as a rule existing anterior to the will, and independent of the action of states, or society, the portion of law which is confessed to originate solely in the will, or decree of states, might properly be distinguished in jurisprudence as a separate division of *law*.<sup>1</sup> When this distinction is made, such portion is known as *positive law*; which designation is proper for the purpose when the term is understood to refer only to the *origin* of that portion in the will of the state.<sup>2</sup> But if the term *positive* is used to express the authoritative nature of the law, no one part of the law is more entitled to the term than another; it is all equally authoritative, whether a rule of natural origin, or originating in the autonomous decree of the state. If the term is used to mean that which is determined upon by the state as its will,—set, settled upon, *positus*,—positive law includes all law recognized as a judicial rule, or *the law* in the sense herein before given as the ordinary sense, viz., those rules of action which are enforced by the authority of the state.<sup>3</sup> Some term is necessary to express a rule originating in the decree of the state, and since this term *positive law* is commonly used to distinguish such law from rules of natural origin enforced by the state, and is also used to express the whole of law in the ordinary sense, the term *positive law* has become a somewhat ambiguous one. *Positive law* is now used by the best authors to signify every rule that is *law*. Jurisprudence is defined by Austin as being the science of positive law; that is, the science of what the rule given or

To say that it emanates as positive law from a Divine, or natural source, is to confound positive law with law whereon it is fashioned, or with law whereunto it conforms.”

<sup>1</sup> Grotius: B. et P., Lib. i., c. i., ix. “1. Est et tertia juris significatio quæ idem valet quod lex, quoties vox legis largissime sumitur, ut sit regula actuum moralium obligans ad id quod rectum est,” etc. “2. Juris ita accepti optima partitio est quæ apud Aristotelem exstat, ut sit aliud jus naturale, aliud voluntarium, quod ille legitimum vocat, legis vocabulo strictius posito: interdum et τὸ ἐν τάξει, constitutum. Idem discrimen apud Hebræos reperire est,” etc.

Hugo: Encyclopædia, p. 16, no. 2, takes jus constitutum, or quod ipse populus sibi constituit, for the Latin term corresponding to what is in the text called *positive law*.

Suarez: De Legibus etc., Lib. i., c. 3, sec. 18.

<sup>2</sup> Compare Neal v. Farmer, 9 Georgia R., 575.

D’Aguesseau: Œuvres, Tom. i., p. 260. “Au milieu d’un grand nombre de lois positives fournies par les mœurs des Peuples, ou par la volonté Souveraine du Législateur.” But in the same vol., p. 447, *natural* is discriminated from *positive law*.

<sup>3</sup> 1 Vaughan R., 191, (anno 19 Car. II.) “For the freehold is not a natural thing, but hath its essence by the positive municipal law of the kingdom.”



allowed by the state is.<sup>1</sup> The science of what *ought to be* the rule is the science of political ethics.<sup>2</sup>

§ 18. If jurisprudence is taken to be the science of law in the strict and proper sense only (which involves the relation of a superior and inferior, § 1), it is the science of the law of a single nation only, i. e., the science of some one *municipal*, or, more correctly, of some one *national* law;<sup>3</sup> and the *international* law is known in jurisprudence only as a subordinate part of some one such national law; or, in other words, the international law is known in jurisprudence only as it may be applied by one national source of law to relations of private persons which grow out of the existence of other nations; since international law is not law in the strict sense, except as it may be enforced by some one nation (ante, § 12). The term *general*, or *universal jurisprudence*, would signify only the aggregated science of different systems of national or municipal law.

§ 19. But since the jurisprudence of each state (as a consequence of its jural character) recognizes natural reason as a rule of intrinsic force,<sup>4</sup> and in its municipal and international law

<sup>1</sup> Savigny: *Heut. Rom. Recht*, § 5. Austin: *Prov. Jurisp.*, p. 181, and notes; also, p. 197, and ante, p. 11, n. 3. Mackeldey, by Kaufmann: *Introd.*, §§ 8, 9, and the notes, distinguishing the philosophy of positive law from philosophical law. Compare Doctor and Student, ch. iv.

Jurisprudence is sometimes used in the sense of the science of abstract right. Long's *Discourses*, (Law Lib., N. S., vol. 44,) p. 5. "Jurisprudence is the science of right."—Brande's *Dict.* Mr. Cushing (*Introd. to the Study of the Roman Law*, Boston, 1854, p. 6) takes it in the sense of the application of law to particular cases; and, in p. 168, gives it the sense of unwritten law, common law, and judicial law: he also uses the term "jurisprudential" as synonymous with *jural*. With the French lawyers, *jurisprudence* is contrasted with the *lois*, *Projet* (of the Code Civil), *Discours préliminaire*, p. xix. \* \* "On ne peut pas plus se passer de jurisprudence que de lois" Foelix, *Dr. : Int. Pr.*, p. 382. "Lois positives et jurisprudence." Mr. Reddie uses it in the sense of the whole national law of some state, or the whole of that rule of action which is applied within a certain national domain. Reddie: *Inq. El. &c.*, ch. v. *Law Review*, London, Nov., 1855, p. 128: "Some term is necessary to denote the science of law, and we shall so employ the word jurisprudence." \* \* \* "By law is here understood positive law,—that is, the law existing by position, or the law of human enactment. Jurisprudence is the science of positive law," &c., citing Suarez: *de Leg. etc.*, L. i., ch. 103, sec. 18.

<sup>2</sup> "For the wisdom of the law-maker is one, and of a lawyer is another." Bacon: *Adv. Learn. Works*, Am. Ed., 1 v., 238.

<sup>3</sup> Falck: *Jurist. Ency.*, § 11, (French tr.) "Comme le droit prend naissance dans la volonté collective d'une société civile, il doit y avoir autant de droits qu'il existe de sociétés civiles ou d'états."

<sup>4</sup> Bowyer: *Univ. Pub. Law*, pp. 84, 85. Whewell's *Elements Mor. &c.*, B. ii., ch. vi., § 213. "Since in all nations the definitions of rights and obligations are intended to be right and just, it is natural that there should be much that is common



applies that reason to the unalterable conditions of human existence, thus recognizing the law of nature, in the primary and secondary senses of the word law, it may be anticipated that some principles or rules will be found to be the same in the law of many different states: and these rules, so found to obtain generally, may be distinguished from the rest of the law of any one state by their extent; that is, by their being generally recognized and enforced by the several possessors of the power of society. And though the whole law of each nation is judicially taken to be conformable to natural reason,<sup>1</sup> those principles, when thus known by their general extent, may be judicially considered founded on the necessary conditions of human existence, and therefore be judicially taken as having universal application in all countries, and under the sovereign authority of every nation.<sup>2</sup> They may be considered, in the jurisprudence of any one country, as natural principles; not only because recognized by the national law, but because founded on the general reasoning of men living in the social state.<sup>3</sup> They may, therefore, be considered the subject of a jurisprudence distinct from that of any one nation—a general, or universal jurisprudence; general, or universal, because historically known to prevail among all nations, or among the more powerful and enlightened.<sup>4</sup>

in the views and determination of all nations on the subject. That which is common in the determination of all nations respecting rights and obligations is called *Jus Naturæ*, or *Jus Gentium*. That which is peculiar to the law of a particular state, or city, is called *Jus Civile*, or *Jus Municipale*. We may distinguish these two kinds of *Jus* as *Natural Jus* and *National Jus*." Also, the same, B. vi., c. i., § 1189.

<sup>1</sup> Ayliffe's *Pandects*, p. 6.

<sup>2</sup> De Tocqueville: *Dem. in Am.*, vol. ii., p. 84. "A general law—which bears the name of Justice—has been made and sanctioned, not only by a majority of this or that people, but by a majority of mankind. \* \* \* A nation may be considered in the light of a jury which is empowered to represent society at large, and to apply the great and general law of Justice."

In Bowyer's *Univ. Pub. Law*, ch. iv., where jurisprudence is exhibited by the *a priori* method, following Domat, *universal* jurisprudence is equivalent to political ethics. Duponceau on Jurisdiction, pp. 126, 128, recommending the study of "general jurisprudence," which, he says, is part of the common law, and which he laments "has fallen too much into neglect," does not distinguish it from "universal justice"—"the eternal principles of right and wrong."

<sup>3</sup> Aristot.: *Rhet.*, L. i., c. 18. 15. Reddie's *Inq. Elem.*, &c., 85-87.

<sup>4</sup> Here universal jurisprudence is derived by reasoning *a posteriori*, according to Grotius' method; and, so derived, it has no necessary identity with that derived *a priori*, in the manner pursued by Domat, (see *Loix civiles*; *Tr. des Loix*, and the summary given by Bowyer, *Univ. Pub. Law*, p. 68,) and also by Pufendorf, and others,

§ 20. The term *law of nations*, *jus gentium*, had been originally employed by the Roman jurists to designate legal principles having this general extent, before it became applied to that

as Manning: *v. Comm.* Writers on international law, or the law of nations, in the same sense, may be divided into two classes: those who derive it *a priori* are, however, properly speaking, writers on *ethics*; those only who derive it *a posteriori* are writers on *law*. Law determined in the manner pursued by the last is derived by the inductive method, or empirically, in the language of the German writers. (For a similar distinction among writers on political and religious systems, compare La Mennais: *Essai sur l'indifférence &c.*, Tom. ii., p. 158. De Maistre: *Soirees de St. Petersburg*, Tom. i., p. 280.)

Bowyer's *Comm. on Mod. Civil Law*, Lond., 1848, p. 26. "The Romans give the reason of the universality of what they call the law of nations in these words,—*quod naturalis ratio inter omnes homines constituit*. But the civilians of modern times have drawn their classification from the reason of the alleged universality of the law, and not from that universality itself, which, owing to the ignorance of some nations, does not in point of fact exist. That reason is, because the obligatory force of the law is pointed out by the mental faculties of man. This universally obligatory law (though not universally observed) is called *natural law*, and is thus defined by Grotius," &c., citing B. et P., Lib. i., c. i., § 10. i. Now Grotius clearly distinguishes in § 12, of the same chapter, between these *two methods of ascertaining the law*; and though he is the leading author following the inductive method, he still attributes *its authority*, when ascertained, to nature, or to the Creator, not to the will of political states. The question, what rules do the mental faculties of man declare to be obligatory? is solved by the history of man's exercise of his mental faculties, and not by the mental faculties of the individual jurist. Mr. Reddie adheres to what may be called the early Roman school, and insists that the modern civilians have erred so far as they have derived their *jus gentium a priori*. Showing, too, that, in fact, the principles of the law of nature, as unfolded by Pufendorf, Cocceius, Wolf, and others, are little else than propositions taken from the Roman law; stripped of all that identified them with the national system of the Romans. (Reddie's *Inq. Elem. &c.*, 74-76, 81.) Gravina declares, *De Ortu &c.*, L. i., Princip.: "*Quoniam nihil aliud est jus civile, nisi naturalis ad Romanæ Reipublicæ institutionem relata, Romanique moribus et literis explicata ratio*," etc.

Bentham: *Moral and Leg.*, ch. xvii. "Of what stamp are the works of Grotius, Pufendorf, and Burlamaqui? Are they political or ethical, historical or judicial, expository or censorial? Sometimes one thing, sometimes another; they seem hardly to have settled the matter with themselves. A defect this, to which all books must almost unavoidably be liable which take for their subject the pretended *law of nature*; an obscure phantom, which, in the imaginations of those who go in chase of it, points sometimes to *manners*, sometimes to *laws*; sometimes to what law *is*, sometimes to what it *ought to be*." And the author here refers to ch. ii., 14, of the same work, and his note to the passage, which is herein before cited, p. 6; and compare Morhof's *Polyhistor*, vol. iii., Lib. vi., c. 1. *De Jurisprudentiæ universalis Scriptoribus*.

Grotius is not, indeed, altogether constant to the method indicated in the passage referred to. Grotius: B. et P., ch. i., 12. "Now that any thing is, or is not the law of nature, is generally proved either *a priori*,—that is, by argument drawn from the very nature of the thing; or *a posteriori*,—that is, by reasons taken from something external. The former way of reasoning is more subtle and abstracted; the latter, more popular. The proof by the former is by showing the necessary fitness or unfitness of any thing with a reasonable and sociable nature. But the proof by the latter is, when we cannot with absolute certainty, yet with very great probability, conclude that to be the law of nature which is generally believed to be so by all, or, at least, the most civilized nations. For a universal effect requires a universal cause; and there cannot well be any other cause assigned for this general opinion than what is called common sense."

law which is herein before called the international law, and which had not with the Romans any recognized existence, as distinct from their own public law, *jus publicum Romanum*. These principles will always constitute a part of the international law, the rules of which are in a great degree founded on their existence, as will be shown in the next chapter. But they exist independently of it, and are equally a constituent part of municipal (national) law.<sup>1</sup> There will always be a necessity for their distinct recognition, and for some appropriate term by which to distinguish them. The term *universal law* has been employed by late English writers to designate these principles, corresponding to the *law of nations*, *jus gentium*, of the Roman jurists.<sup>2</sup>

§ 21. Law, in being a rule of action, necessarily regards both agents and objects of action; and thus in its inception constitutes the first distinction known to the law, in determining who or what are agents, and who or what are the objects of

<sup>1</sup> D'Aguesseau: Œuvres, Tom. i., p. 444. Duponceau on Jurisdiction, pp. 18, 110, 126, 128. Compare, also, Bacon: De Augmentis, Lib. viii., De justitia universalis, seu de fontibus juris. Selden: De J. nat. et Gen. &c., Lib. i., c. iii., vi.

<sup>2</sup> Bentham uses the term *universal* to describe those principles which are commonly received among all nations. See *Morals and Legislat.*, ch. xviii., 24. "In the first place, in point of extent, what is delivered concerning the laws in question may have reference either to the laws of such or such a nation, or nations, in particular, or to the laws of all nations whatsoever; in the first case, the book may be said to relate to *local*, in the other to universal jurisprudence."

"Ealra theoda riht, (the right of all nations,) *jus gentium*." Bosworth's *Lexicon Anglo-Sax.*, verb, *Riht*.

There is no classic Greek term answering to the Latin *jus*. *νόμος* corresponds to *lex*. The distinction between a *jus ἴδιον*, proprium, id est populis vel civitatibus singulis civile, and a *jus κοινόν*, commune, is remarked by Aristotle, *Rhet.*, Lib. i., c. 13, 15, where he also designates the latter as being that which is *κατὰ φύσιν*, secundum naturam; but recognizing it to be so from the fact that it is universally received. Comp. Thuc., B. iii., 59, τὰ κοινὰ τῶν Ἑλλήνων νόμιμα. The Byzantine jurists, who, about A. D. 876, prepared the Greek version of the Corpus Juris, known as the *Basilica*, (v. Smith: *Dict. Antiq.* Butler's *Horræ Juridica*, app. iv.,) used the term *νόμος ἐθνικόν*, and also coined from *juris-gentium* the word *ἰουρισγερτίος*. See Selden: *De J. Nat. et Gent. &c.*, Lib. i., c. vi.

Brougham: *Polit. Philos.*, Prelim. Disc. "It is a very common error to confound with this branch of the law" [referring to *international law*, here denominated by Lord Brougham "the law of nations,"] many of those general principles of jurisprudence common to all nations, and to term these a portion of the law of nations." With equal justice it may be said the error lies in calling *international law* by the name "law of nations;" or rather, it lies in calling by one name two distinct sets of legal principles, viz., principles known, or denominated from their general recognition, or application by nations, and those rules which are applied as a law between nations; which last are derived both from the first—the principles universally recognized—and from the agreements and customs of particular states.

action. Agents, under a rule of action for moral beings, being necessarily such as are considered by the author of the rule capable of choice and action; or *persons*, to be distinguished from *things*: the latter being only the objects of action, and incapable of personality—that is, of capacity for choice and action.

The action of persons may be in direct relation to other persons as the objects of action; and even in relation to things, as such objects, is of legal significance only in respect to other persons. In other words, all legal relations are relations of persons to persons—directly, or through things.<sup>1</sup>

§ 22. A legal relation between persons consists in a privilege and obligation as mutually essential. This privilege and obligation exist in each of these classes of relations, constituting rights and duties as correlative, or as necessary co-efficients of each other.<sup>2</sup>

When rights and duties are classified, they must always be taken as rights and duties of persons, since it is only by the prior recognition of persons that relations, privileges, and obligation can be said to exist. Rights and duties cannot be separately classified in any system of jurisprudence, because, being correlative, they cannot be separately described; the definition of one is involved in the definition of the other.

§ 23. The prominent distinction between rights (with their correlative duties) is that of being rights in relations wherein persons are the objects of action, and rights in relations wherein things are the objects of action. But since persons and things are associated in every action of natural persons, it is impossible to make an accurate classification on this distinction.<sup>3</sup> Rights

<sup>1</sup> Ahrens: *Naturrecht*, p. 88. Tr. "A being endowed with self-consciousness, reason, and freedom [power of choice] is called a person, or has personality."

"The law relates to persons as its groundwork and aim, (Zweck.) That is, it has an essentially personal character. The distinction which is ordinarily made between the law of persons and the law of things, as of two co-ordinate parts of the law, is therefore inaccurate. All law is throughout a law of persons."

"The law necessarily relates to things also, inasmuch as these compose the physical conditions of human development. But the law relative to things constitutes only a subordinate division of the law relating to persons."

<sup>2</sup> *Jus et obligatio sunt correlata*. Thibaut: *Syst. Pand. Rechts*, Elementary Part, § 1. (Lindley's Transl. in vol. 86 of Law Library.)

<sup>3</sup> Compare Austin: *Prov. of Jurisp.*, Appendix, xviii.—xxv. Wesenbecii *Comm. ad Pandect*, Lib. i., tit. v., num. 1, n. "Omne jus quo utimur, vel ad per-

considered without reference to specific things as the objects of action may be called *rights of persons*, and distinguished from rights considered with reference to specific things, or classes of things, as the objects of action: which may in a certain sense be called *rights of things*; meaning, however, rather the relations of things to persons having rights and duties in respect to those things.<sup>1</sup>

§ 24. A right may be considered as to its subject or its object. The subject of a right is the person in relation to whom it exists; its object is the matter to which it relates.<sup>2</sup>

Persons, both as agents and objects of action, are the subjects of rights. Things can only be the objects of rights, as well as the objects of action.

As, from the nature of *things*, they can be regarded in a rule of action only so far as they are in the power and possession of agents, or persons, property is an essential attribute of the nature of *things*.<sup>3</sup>

*sonas pertinet quibus jus redditur, vel ad res de quibus jus redditur, vel ad actiones sive judicia per quæ jus redditur.*" Here, in the first instance, *jus* signifies the jural rule; afterwards, it has the sense of a right, or privilege.

See Reddie's *Inquiries Elem. &c.*, pp. 146—159, for the distribution or arrangement of private law made by Gaius, Grotius, Bodinus, Bacon, Leibnitz, Coccineus, Pothier, and Millar of Glasgow.

<sup>1</sup> Reddie's *Inq. Elem. &c.*, p. 171. "Now rights and obligations are manifestly the attributes of persons, not of things. And to divide rights, like Judge Blackstone, into the rights of persons and the rights of things, if by the latter words are meant rights, not over, in or to, but belonging to, or inherent, and vested in things, we have seen, either evinces inaccuracy of thought, or is, at best, misapplication of language. Again, rights and obligations are not merely the attributes of persons singly; they pre-suppose and exist only in reference to other persons. A single man existing on the surface of this earth would have certain physical powers over external things, but no legal rights."

"But although rights and obligations are in reality, and correctly, the relations of individual persons, to other individuals, they are plainly correlative terms."

Hale, whom Blackstone followed in this distribution, used also the Latin terms *jura rerum* and *jura personarum*. The word *jus* signifies law, as well as a right—the effect of law. *Jura rerum*, in the sense of the law relating to things, would have a meaning. Compare 1 Starke's *Ev.*, p. 1, n. b. Austin: *Prov. of J.*, append. xix.

<sup>2</sup> In the languages of which the Latin is the principal basis, (the *Romance* languages,) *subject* (e. g. *sujet*, Fr.) is commonly used to designate that which is here called the *object* of a right. Mackeldey's *Civil Law*, Comp. *Introd.*, § 14. "In connection with every right, we find a subject and an object. The subject of the right is the person on whom the right is conferred; the object of a right is the matter to which it relates." The German writers generally, when employing the words as German words, use them in the manner here followed in the text. See Hugo: *Encycl.*, p. 11. Lindley's *Translation of Thibaut*, append. ii.

<sup>3</sup> Compare on these sections, Long's *Disc.*, p. 109—115. Coode on *Legislative Expression*, p. 9.

§ 25. By regarding states, or sovereign powers, as determining either the laws of their own existence, or the rules of action for persons subject to their supremacy, international and municipal (national) law may each be divided into two parts—viz., *public* and *private*; though, since the relations of individual persons are in the end the objects of each division, the distinction cannot throughout be accurately observed.<sup>1</sup> It is, perhaps, more correct to say, municipal (national) and international law may each be distinguished as either public or private law, according to the public or private character of the persons whom it affects.<sup>2</sup>

That may be called *private municipal* (national) law which determines, within the limits of a state, the relations of persons towards each other in all incidents of the social state distinct from the political existence of the supreme power.

The *public* part of *municipal* (national) law is that by which the supreme power defines or asserts its own nature, bounds, and purposes within its own limits; and the investiture or seat of that power; either, as existing undivided, or centralized in a whole people, or in a larger or smaller portion of it, or in a single family, or person; or, as being divided and distributed, according to its objects, among various depositaries.

<sup>1</sup> Mackelley's Compend. Introd., § 8. "With respect to its object, all positive law may be divided into public and private law. The public law (*jus publicum*) comprehends those rules of law which relate to the constitution and government of the state; consequently, it concerns only the relations of the people to the government. The private law (*jus privatum*) comprehends those rules which pertain to the juridical relations of citizens among themselves." This division of the law into public and private is found in the Institutes, and observed principally in the writings of the civilians. If not very philosophical, or distinctive, it is convenient, especially in treating of conditions of freedom, or its opposites; which are spoken of in a political, as well as a social connection. It is not, however, essential that the subject of jurisprudence should be thus divided. Austin, in Prov. Jurisp., Appendix, lxi., observes: "As I shall show, also, every department of law, viewed from a certain aspect, may be styled private; whilst every department of law, viewed from another aspect, may be styled public. As I shall show further, *public* law and *private* law are names which should be banished the science; for since each will apply indifferently to every department of law, neither can be used conveniently to the purpose of signifying any. As I shall show, moreover, the entire corpus juris ought to be divided at the outset into law of things and law of persons; whilst the only portion of law that can be styled *public* law with a certain, or determinate meaning, ought not to be contradistinguished with the law of things and persons, but ought to be inserted in the law of persons as one of its limbs, or members."

Mr. Reddie: Inquiries Element. &c., 261-2, regards the distinction between public and private law as essential in every system.

<sup>2</sup> Savigny: Heut. Rom. Recht, B. i., c. 2, § 9. The German term bürgerliches Recht corresponds to *private* law. Heffter: Europ. Völkerr., § 87.



The *private international law*<sup>1</sup> determines the relations of individuals towards other national authorities or jurisdictions than that with which by the public municipal and international law they are primarily associated as subjects; and constitutes, in connection with the private municipal law, the rules of ordinary peaceful intercourse of nations as composed of private individuals.

*Public international law* is that which concerns the mutual relations of sovereign states or powers, as such; determining the nature of such relations, and, for the purpose of maintaining them, furnishing the rules of diplomatic intercourse and military arbitrament.

By these two divisions of *public law*, in various forms of expression, have been determined the territorial limits for the exclusive sovereignty of different nations, in legitimating acts of force, or agreement, as being rightful in their own nature, or in their existing results.

§ 26. The distinction of the law as being municipal (national) and international is founded on the separation of society into states occupying certain distinct geographical limits, or portions of territory: the two branches, municipal (national) and international, each contemplate the agents and objects of action according to the territorial jurisdiction under which they may be found. The international law recognizing states as having authority within certain territory, and persons as primarily subject to one or another system of municipal (national) law according to their locality. In this view laws are *territorial* in their nature, as having effect within certain geographical limits.

But law is always in its nature personal, or a law for certain persons. *Jurisdiction* is a term signifying the authority of law over a certain territory, or over certain persons; but since the action of persons must always be the essential object of all laws, the jurisdiction of laws over a certain territory means over all persons within that territory.

<sup>1</sup> The use of the term Private International Law is now very generally received; vide 1 Kent's Comm., p. 2, referring to M. Victor Faucher. See, also, an article by the latter on Private International Law, in Am. Jurist, vol. xx., p. 83. Story: Conf. Laws, p. 9. Phillimore: International Law, Pref. xv., and p. 12. Foelix: Tr. du Droit International Privé, § 1. "Le droit international se divise en droit public et en droit privé." Schæffner: Entwicklung des Internationalen Privat Rechts; Frankfort, 1841. Heffter: Europ. Völkerr., § 38. Waechter, in Archiv. f. civil. Praxis, Bd. 24, 25:

And though laws are known as rules having a coercive force only in and for some particular geographical district, they may be spoken of, or classified and distinguished, by their application to particular persons. Laws in establishing relations among men, necessarily establish differences between them as the subjects or objects of the rights and obligations composing those relations, and persons under any system of law may be classed according to the differences which it recognizes among them; and the law itself may be distinguished as attaching to certain persons, or as being divided into different *personal* laws, as well as being the territorial law of some national jurisdiction.

§ 27. This distinction of laws as personal may obtain both in national (municipal) and international law; and it is essential when those divisions are contrasted with each other as the constituent parts of private law—i. e., law applying to private persons. The national (municipal) law, which, according to the definition of it before given, applies to persons as the law of a certain territory, may create a variety of relations for different individuals; and when the international law (which is law in an imperfect sense only when states are regarded as its subjects) is applied or enforced by some state within its own territory, and becomes a law acting on private persons, it is necessarily applied as a personal law; because it is applied by recognizing persons as connected with different nations, and by way of exception to the territorial, or municipal law of some one state. So far as it exists distinct, within any one jurisdiction, from the national law thereof,—it applies as a personal law.

So far as any legal principles which are included in the universal law, or "*law of nations*," establish relations for, or between particular persons, they also may be considered as a

<sup>1</sup> Hobbes: *Leviath. De Civitate*, c. xxvi. "Legum autem alia civibus statuitur universis; alia certis provinciis; alia certo hominum generi; alia homini quandoque singulari." Story: *Conflict of Laws*, § 51. Bowyer's *Univ. Public L.*, p. 144-7. Hamilton's *Hedaya*: *Introductory Disc.*, respecting personal laws in Hindostan; and *Stat. 21, Geo. III.*, ch. 70, relating to Inhabitants of British India. Sir Wm. Jones: *Inst. of Hindu Law*, art. 203. Savigny: *Geschichte d. R. R. im Mittelalter*, Bd. i., p. 115. Canciani: *Leges Barbarorum Antiq.*, vol. i., p. 345. *Sachsenspiegel—Schwabenspiegel*: Ancient Collections of the customary law of the Saxons and Swabians. The jurisprudence of the Middle Ages was characterized by the personal extent of laws; and, as matter of history, the personal extent of law has been anterior to its territorial extent. See Savigny: *Heut. Rom. R.*, § 346.



personal law, taking effect by their recognition by separate states, or nations, each applying them in municipal, or international law, as before defined.

§ 28. Although it is herein before assumed that natural law has no recognition in jurisprudence as *legally authoritative*, except as it is supported by the power of society, or of the state, and therefore, when legally or judicially operative, must be identified with positive law, yet it is also considered as being true in point of fact that all sovereign states have acknowledged in some form the pre-existence of natural principles of right, and as the originators of positive law have claimed to correspond with them. Among authors and legislators these principles have always been recognized under names indicating the difference of their *origin* from that strictly called positive law, such as the law of nature, the divine law, the law of right reason, &c.<sup>1</sup>

Whether all interpretation of these principles, given by sovereign states in their municipal laws, can be considered as actually corresponding with the real divine, or natural rule, which they suppose to be pre-existing, may be judged from the various decisions which successive generations of lawgivers have passed on the acts of their predecessors, each in turn founding their own judgments and corrections upon a claim to more just views of truth and right reason.

§ 29. The application of jurisprudence to the relations of persons and things is in most modern states made by judicial tribunals, distinct from the supreme legislating authority of the state.<sup>2</sup> But whatever rules or principles such tribunals may apply as law, they apply them as being the will of the supreme authority, and as being themselves only the instruments of that will. The will of the state is to be ascertained by the tribunal in one of the following methods:—

First. Direct, or positive legislation, is the first and ruling indication of the will of the state, whether it acknowledges or refers to any rule of natural origin or not.

Second. Since the will of the state is to be presumed to

<sup>1</sup> Grotius: B. et P., Lib. i., c. i., § 10. D'Aguesseau: Œuv., Tom. i., pp. 446—449, Première Instruc. Whewell: Pol. and Mor., § 477. Cicero: De Rep., iii., 22.

<sup>2</sup> Lieber: Political Ethics, § 183. Pascal: Lettres Provinciales, xiv.

accord with natural law, where the positive legislation of the state does not decide, the tribunal must ascertain the natural law which is to be enforced as the will of the state.<sup>1</sup> But this law can only be determined by such *criteria* as are supposed to be recognized by the supreme power of the state, if such criteria exist; and this law when so determined becomes identified in its *authority* with positive law.<sup>2</sup>

If a state is supposed to be in the commencement of its existence as a state administering law, or governing by law, the only exposition of this natural law would be the reason and conscience of the judicial tribunal.<sup>3</sup>

§ 30. But since every judgment of the tribunal which has been executed and upheld by the power of the state must be received as accordant with its will, every such judgment becomes an indication of the natural law, as received by the state, and, therefore, equal in authority, for the judgment of future tribunals, to the law received by positive legislation. Tribunals established by the state have, therefore, of necessity, a *quasi*-legislative power; or—the tribunal, the object of whose institution is to apply the law given by the state, is incidentally a source of law.<sup>4</sup>

But there is this difference between its powers in this respect and those of the state itself, that the latter is not, in any *legal*

<sup>1</sup> To use the terms of Roman jurisprudence—the law proceeding from the legislator is expressed by *esto*; that proceeding from the tribunal by *videtur*. Bacon de Aug. Sc., lib. viii., c. 3, 10. Aphorismus 32. “Curis sunt et jurisdictiones quæ statuant, ex arbitrio boni viri et discretionis sana, ubi legis norma deficit. Lex enim, ut antea dictum est, non sufficit casibus sed ad ea quæ plerumque accidunt aptatur. Sapientissima autem res Tempus, (ut ab antiquis dictum est,) et novorum casuum quotidie auctor et inventor.”

<sup>2</sup> Ram on Judgment, p. 2: “A judgment that is constructed of certain materials which are law, and is, when delivered, a part of the law of the land.” Legislation is first in respect to authority, but in the natural order of existence the judicial rule appears first. Reddie's Inquiries, &c., p. 110—112.

<sup>3</sup> See Encyc. Am., vol. vii., pp. 576, 580, 586. Appendix; Law, Legislation, Codes: by Judge Story—do. p. 584. “The legislation of no country probably ever gave origin to its whole body of laws. In the formation of society, the principles of natural justice and the obligations of good faith must have been recognized before any common legislature was acknowledged,” &c. Cushing: Introd. to Study of the Roman Law. Boston, 1854, p. 22.

<sup>4</sup> Reddie's Inq. Elem. &c., p. 193—5. Bentham, objecting against this source of law, calls the common law, a law *ex post facto*: see Papers relative to Codification, No. I., § 3, and Reddie's Inq. Elem. &c., Suppl., p. 104. Dig. L. i., Tit. 4, § 38. Consuetudinem, aut rerum perpetuo similiter judicatarum auctoritatem, vim legis obtinere debere.

sense, *bound* by any previous interpretation of the natural law, and is, in the theory of jurisprudence, to be considered as the criterion of the provisions of that law, while the tribunal is presumed always to follow standards of interpretation of natural law already acknowledged or accepted by the state, so far as they exist.<sup>1</sup>

The decision made by any judicial tribunal may, therefore, be always compared by succeeding tribunals with other standards of natural law which are presumed, equally with that decision, to indicate the natural law as received by the state. With the lapse of time, by the accumulation of concurrent expositions of the natural law, the power of each tribunal, successively to make law in this incidental manner, becomes more limited; because the recognition of natural law by the state, through anterior tribunals, has become more definite by being more widely applied.<sup>2</sup>

§ 31. The principle by which judicial precedent becomes an exposition of the legal rule of action, is also that which causes *custom* to be juridically recognized as having the coercive force of positive law. It is not that any number of similar actions

<sup>1</sup> Bentham: *Morals and Legislation*, ch. xvii., 20 (of Appendix to the original ed., 1828, vol ii., p. 274). "In that enormous mass of confusion and inconsistency, the ancient Roman, or, as it is termed, by way of eminence, *the civil law*, the imperative matter and even all traces of the imperative character, seem at last to have been smothered in the expository. *Esto* had been the language of primæval simplicity: *esto* had been the language of the twelve tables. By the time of Justinian (so thick was the darkness raised by a cloud of commentators), the penal law had been crammed into an odd corner of the civil—the whole catalogue of offences, and even of crimes, lay buried under a heap of *obligations*—*will* was hid in *opinion*—and the original *esto* had transformed itself into *videtur* in the mouths of even the most despotic sovereigns." It depends upon the intention, whether this was blamable or not. It was perhaps only an affectation on the part of the prince to speak like an expounder of existing law when called upon, by an exercise of autonomic juridical power, to relieve the law of obscurity, caused by conflicting opinions of juridical persons who were not sovereign.

<sup>2</sup> Ram: *Legal Judg.*, c. i., xiv. Bacon, *de Aug. Lib.*, viii., c. 8, 10. Aphor., 21—31. Lindley's Thibaut, *Append.*, xii., and note. Falck: *Jurist. Ency.*, § 10. (French Tr.): "A côté du droit coutumier vient se placer la *pratique judiciaire*, *Gerichts-gebrauch*, l'usage du palais, (*usus fori*, *Observanz*, *stylus curiæ*) c'est à dire, l'ensemble des règles de droit qui se forment par la pratique uniforme des fonctionnaires publics dans les affaires juridiques.

"Les maximes ainsi établies ont aussi force des lois; mais quand commencent elles à l'avoir? C'est ce qu'il n'est pas possible de préciser; tout se réduit à ceci; il faut que le nombre des *précédents* (*præjudicatæ*) soit suffisant pour constituer une opinion sur un point de droit. Il est évident qu'il serait irrationnel d'attribuer un pareil effet à une seule décision judiciaire. Quelquefois cependant l'autorité d'un fonctionnaire ou d'un corps a été assez grande pour mettre hors de doute, par une seule décision, des points de droit controversés."

by private persons in certain supposed circumstances can make a law for others in similar circumstances. No one person subject to the supreme power of civil society is legally held to do, or refrain from doing, this or that act, simply because others before have, or have not, done the same; nor have any number of private individuals the power, by their example, to establish a coercive rule for another individual. Custom is juridically regarded as an effect of law, not as a cause of law. It is judicially received as an exposition of law, because that which has been generally received and acted upon by the subjects of a civil state as a rule of action is presumptively identified with the will of the supreme power of the state,<sup>1</sup> and is, therefore, judicially held to be reasonable or jural. The existence of the custom is judicial evidence of a rule accepted by the state for a rule of natural reason applied to certain circumstances:<sup>2</sup> and hence a

<sup>1</sup> Aristot. : Rhet., Lib. i., c. 2. Metaphy., Lib. i., c. 8. Selden : De J. Nat. etc., Lib. i., c. 6. Cicero : de Inventione, Lib. i. &c. Hobbes : De Civitate, ch. 26.

<sup>2</sup> Savigny : Hent. Rom. R., § 12. "So ist also die Gewohnheit das Kennzeichen des positiven Rechts, nicht dessen Entstehungsgrund." Custom is therefore the mark by which positive law is known to exist, not the cause of its existence. Tr., and refers to Puchta : "Das Gewohnheits Recht." "Every custom supposes a law," per Vaughan Ch. J. VII. Viner's Abr., 188. Statute law and common law as contrasted with Statute law, in English jurisprudence, have, therefore, the same theoretical foundation. And herein lies the essential correctness of C. J. Wilmot's saying, in 2 Wilson, 348. "The statute law is the will of the legislature in writing; the common law is nothing else but statutes worn out by time. All our law began by consent of the legislature, and whether it is now law by usage or writing is the same thing,"—and p. 350 : "And statute law and common law both originally flowed from the same fountain." But compare the doctrine of Bl. Com., Introd., Sect. 8.

"Positive law," in English and American jurisprudence, is not always taken to mean statute law. Thus, in Somerset's case, Lord Mansfield says : "Positive law, which preserves its force long after the time itself from whence it was created, is traced from memory,"—but a legal rule is not a statute rule if the time of its enactment cannot be shown. So C. J. Shaw says, 18 Pick. R., 212 : "by positive law in this connection may be as well understood customary law as the enactment of a statute;" and Blackstone, speaking of a provision of the common law, says, 1 Comm., 70 : "now this is positive law fixed and established by custom."

Properly speaking, when custom has this general extent, its antecedent continuation is not inquired into, it is simply *law*. "A custom cannot be alleged generally within the kingdom of England; for that is common law." Co. Lit. fo., 110 b., and fo. 115 b. Sir Henry Finch, Tr., p. 77. Only particular customs require proof of their having been received for a certain length of time, to give them the force of law. Thus the authority of the Constitution of the United States rests on general custom, and much of the law of the several states not derived from England is customary law, although it has not had an existence such as is required by the law of England to give authority to a particular custom. Compare Mass. Quarterly Rev., vol. I., p. 466, On the legality of Slavery.

Of laws losing their force by desuetude. 1 Kent, 467, marg. p. 517, 7th ed., note. Dr. Irving's Introduction to the Study of the Civil Law, pp. 123—127. Woodes : Lect. prel., p. xxxiii.

custom must be tested by other indications of natural reason which, in judicial recognition, are identified with the will of the supreme power.<sup>1</sup>

§ 32. Not only may judicial tribunals compare together the judgments of their predecessors in applying natural law to new relations of persons and things, but they may also adopt similar comparisons made by private individuals, either oral or written, and such private writings or exposition of the law may, by force of continued judicial recognition, become a farther limitation on the discretion of subsequent tribunals.<sup>2</sup>

§ 33. Besides, since all states, though independent of each other, are equally possessors of the powers of society, and hold it for the same ends, they may be equally presumed to intend to conform their laws to the natural law.<sup>3</sup> The laws of foreign

<sup>1</sup> This testing the *legality* or *lawfulness* of a custom is a judicial act, and to be distinguished from autonomic recognition or disallowance of customs by the sovereign. Co. Lit., fo. 141, a. : "Malus usus abolendus, and every use is evil that is (as our author saith), against reason; quia in consuetudinibus non diuturnitas temporis, sed soliditas rationis est consideranda. And by this rule cited by our author at the parliament holden at Kilkenny in Ireland, (40 E. 3) Lionel, Duke of Clarence, being then the Lieutenant of that realme, the Irish customs, called then the Brehon law (for that the Irish call their judges Brehons), was wholly abolished; for that (as the parliament said) it was no law, but a lewd custom, et malus usus abolendus est. But our student must know that King John," &c. The gist of Coke's following observations appear to be—that it was by a sovereign legislative act of the Conqueror that the Brehon law was changed. In *Le case de Tanistry*, Davis Rep., the validity of a Brehon custom of inheritance was argued before the courts, and the usage decided to be invalid; because, according to the established judicial tests, it was no *custom* at all: the term custom having a fixed technical meaning.

<sup>2</sup> Kent's Comm. Lect., xxi., xxii. Falck: Jur. Ency. (French Tr.), § 10: "La doctrine, c'est à dire la theorie de ce qui est droit, exposée de vive voix ou par écrit, par les savants voués à l'étude de la jurisprudence, devrait, d'après sa nature, être seulement un moyen auxilliaire pour apprendre à connaître le droit en vigueur; cependant elle est devenue, à plusieurs égards, une véritable source du droit. La littérature juridique en particulier a exercée, à certaines époques, comme le montrent toutes les histoires du droit, une si grande influence, que beaucoup d'ouvrages de jurisprudence ont obtenu formellement force de loi. Mais, il faut le dire, c'est là un abus véritable, qui n'a pas d'autre motif que la paresse d'esprit, ou la foi à l'autorité."

Dig., Lib. I., Tit. ii., c. 2, § 12. Ita in civitate nostra, aut jure, id est lege, constituitur, aut est proprium jus civile, quod sine scripto in sola prudentum interpretatione consistit.

Grotius, B. et P., Lib. I., c. i., § 14. Savigny, on the vocation of our age for legislation and jurisprudence, Hayward's Transl., pp. 28, 29, 30. Ram on Legal Judgment, ch. 18, sect. 5. Reddie: Law of Marit. Com., p. 438.

This authority of private jurists must depend upon some juridical recognition: compare Bacon: de Aug. Sci. Lib. viii., c. 8, § 10. De Justitia Universali, App., 72—93.

Though in the Roman system, an intrinsic authority seems to have been attributed to the Responsa Prudentum: see Savigny: Hent. R. R., B. I., c. 8, §§ 14, 26. Butler's Horæ Juridicæ, Essay, Roman Law. De Ferrière: Hist. of Roman Law, ch. ix.

<sup>3</sup> Heffter: Europäisches Völkerrecht, p. 22, speaks of a class or school of publicists

states (i. e. their municipal, or, more correctly, their national laws), whether arising from positive legislation, or from the judgment of their tribunals, applying the law of natural reason, may also be received by the tribunals of any one state as an exposition of the law of nature, where its own positive legislation or judicial interpretation of natural law does not afford sufficient guidance.<sup>1</sup>

§ 34. And when any principles or rules of action have been so long and so generally recognized among many nations that they have been historically known as the *law of nations*, or *universal* principles forming the subject of a general or universal jurisprudence, they will, for the same reason, which here applies still more forcibly, be presumed to conform to natural reason or natural law;<sup>2</sup> and be judicially received as the presumptive will of

who find the natural law of jurisprudence in the expressed will of states, by assuming that they have intended to do justice—"Das Wollen der Gerechtigkeit in den Willen der Nationen eingeschlossen betrachten."

<sup>1</sup> Sir Henry Finch: Treatise on the Common Law, p. 6. Ram: Legal Judgment, p. 69—71, 76. Marshall: on Ins., Prelim. Disc. p. 24. Reddie's Inq. Elem. &c., p. 196. "Finally, in the exposition of common law, judges have been accustomed to look to the legal systems and judicial experience of other nations, if not as standards, or imperative sources of the law, at least as affording practical guides by which they may be led to decide aright, &c." On this principle, the Roman law is referred to in English and American jurisprudence. Wood's Inst., Introd: Spence: Equity Jurisd. of Court of Ch., vol. i., 119, 122—3. 5 Bingham, 167. Long's Discourses, passim; Reddie's Hist. View of Marit. Com., pp. 428. 438. Cushing's Roman Law, §§ 250, 333, 4, 5. Butler's Horæ Juridicæ, p. 60. So also the Canon Law, even in Protestant countries, Hor. Jurid. p. 122.

In the tribunals of Continental Europe, the Roman law has so long been received on this principle, that it is looked upon by many of the civilians, as being in and of itself an authoritative exposition of natural reason. In their language—*Valet pro ratione, non pro introducto jure. Non habet vim legis, sed rationis. Servatur ubique jus Romanum, non ratione imperii, sed rationis imperio.*

<sup>2</sup> Savigny: Heut. R. R., B. i., c. 3, § 22. Grotius: B. et P., Lib. i., 12, 2. Cic. i., Tusc. Ep., 117—"In omni re consensio omnium gentium jus naturæ putanda est."

<sup>3</sup> Bla. Comm., 11, note by Christian. "I know no other criterion by which we can determine any rule or obligation to be founded in nature than by its universality, and by inquiring whether it has not in all countries and ages been agreeable to the feelings, affections, and reason of mankind."

Doctor and Student, p. 63. *Doct.* "Therefore it seemeth that contracts be grounded upon the law of reason, or at least upon the law that is called *jus gentium*;" and p. 176: *Stud.* "First, it is to be understood that contracts be grounded upon a custom of the realm, and by the law that is called *jus gentium*, and not directly by the law of reason."

It is this ascertained standard which apparently Pothier, in Treatise on Obligations, 15, intends by "pure natural right." And see definition of *Maxims*, in Ram: Legal Judgment, p. 14, and the citations.

Whatever principle a tribunal may admit to be a principle of universal jurisprudence must be taken to be received in the national law which that tribunal is appointed to administer. (Suarez: De Leg. et Deo Legis., Lib. ii., c. 19, § 2—6.)



the state: and though these principles must originally have acquired that character of universality from the independent legislative wills of single states, yet, when they have acquired that historical character, they may be judicially received by the tribunals of any one state as an *independent* indication of natural law, presumed, from the fact of being received in universal jurisprudence or for universal jurisprudence, to be adopted as *a priori* principles by that national power whose juridical will the tribunal is intended to execute.

§ 35. When the natural law, or law of natural reason has thus been judicially interpreted, and thus made a part of the *positive* law of any one state or nation,<sup>1</sup> (i. e. positive in respect to

The tribunal refers to the historical indicia of this universal jurisprudence as being one of the criteria of the legislative will of the state, which is to be juridically applied. In the Roman jurisprudence, no principle was ascribed to the *jus gentium*, which was not included in the civil law (i. e., national law) of Rome. Comp. Foelix: *Droit International Privé*, § 5. Reddie's *Inq. El. &c.*, p. 26, and see *post* ch. ii., and iv.

But for an opposite theory of natural law in Jurisprudence, see Hoffman's *Legal Outlines*, sect. viii.

Smith's *Merc. Law*, p. 2. Speaking of the comparative utility of historical researches in the law of real estate and mercantile law:—"Our mercantile law, on the contrary, is wholly founded on considerations of utility; and though many of its rules are derived from the institutions of ancient times and distant countries, still is their introduction into our system owing, not to a blind respect for their origin, but to an enlightened sense of their propriety. No one, unless acquainted with their feudal source, could assign any reason for those rules which respect fines, escheats, or recoveries; but it is not necessary, for the purpose of enabling the reader to see the justice and good sense of the law of general average, to show him that it formed part of the maritime code of the ancient Rhodians. At the same time, it cannot be denied that the history of our commercial law is a subject of great interest and rational curiosity, &c."

Here is an example of a very common misapprehension of the origin of law in general, and particularly of the derivation of that branch called mercantile law. The author misapprehends the reason why the rule of general average has the force of law in cases of maritime losses. It is not law *because* agreeable to justice and good sense. If it were not that the maritime nations of Europe (the Rhodians being the first, perhaps, as matter of history) had actually given it the binding force of a law within their several jurisdictions, the judges of English courts would have had no right to apply it in enforcing a contribution. If the judges of our courts should to-morrow be of opinion that the rule hitherto pursued is not "agreeable to justice and good sense," they might—according to the author's argument—decline to apply it any longer.

And see another instance in Abbott on Shipping, Preface to the First Edition; where the author gives the reasons for referring to the maritime code of Louis XIV., as authority for English tribunals; and see Benedict's *Admiralty Pr.*, § 5. Duer, on *Insur.*, p. 2. Emerigon, c. i., § 6, note, by English editor. That the Roman tribunal made judicial reference to the laws of the Rhodians on the ground of its being an existing foreign law, see Peckius: *De Re Nautica*, Ad leg. Rh. De Jactu. *Rubrica*.

<sup>1</sup> Vinnius *Comm.*, Lib. i., Tit. 2, § 1. "Vocaturque jus civile."—In specie nimirum, nam jus civile sumptum pro eo jure quo in universum civitas utitur, etiam jus naturale et gentium, quatenus receptum est, comprehendit; eoque sensu, obligationes, quæ ex contractibus juris gentium descendunt, dicuntur civiles: licet a legislatore

its authority, *v. ante*, § 17,) it may still be distinguished as the unwritten law, the customary law, the common law of the land.'

civili nihil habeant præter approbationem, (§ 1, inf. de oblig.) Hoc igitur dicitur civile a causa efficiente, quæ est voluntas alicujus civitatis aut ejus qui jus legis ferendæ in ea habet, non communis gentium aut naturalis ratio. Ab Aristotele legitimum dicitur: vulgo positivum."

<sup>1</sup> Even under a written code, this part of the law must continue. See, as to the recognition of this, under the French Code, Savigny: *Vocation of our Age*, &c. Hayward's Tr., p. 90. Also, Duponceau on Jurisd., p. 106. Reddie's Inq. Elem. &c., pp. 199—202.

In this description of the mode in which positive law becomes judicially ascertained, there is no distinction of any part of the law which can be distinguished from the rest as equity, or as an equitable rule of action. The distinction which exists in English and American jurisprudence between *law* and *equity* is not in the nature of the rule, but in the means by which it is enforced. "In England and America Equity, in the technical legal sense of that term, as opposed to or distinct from the common law, is in reality as much as the common law, customary or judiciary law; a part of the general law of the realm." Reddie: Inq. Elem., p. 124. Blac. Comm., 8, c. 27, p. 432. Every rule of action which the supreme power in England or America enforces as law is equally jural—equally a *lex juris*. The distinction here is one of jurisdiction, or of remedy—the application of the rule of action, arising from the authority allowed to judicial precedent, and a consequence of that supremacy of law as opposed to arbitrary discretion, which is a characteristic of "Anglican liberty." (For the use of this term, see Lieber: *Civil Liberty and Self Government*, vol. i., ch. v.) The occasion given to a common misconception of the nature of positive law by the existence of an "Equity Jurisprudence," may excuse an attempt to set this forth in the limits of a note.

The rule of action to which the state gives the authority of law must be enforced or vindicated by the state, if it is to be efficacious in accomplishing the object of the state, i. e., justice. This can only be done by judicial remedies. In a state where precedents have great force as an indication of the will of the supreme power, the remedy which has been applied to enforce the rule of action becomes itself a precedent, that is, it becomes a rule or law of remedy, and thus the efficacy of a rule of action becomes limited to circumstances in which only a remedy has been before applied. The same effect would take place if the remedial mode of enforcing the rule of action were prescribed by statute.

The rule of action will thus, in course of time, fail in many instances of its original intention, i. e., justice: because new circumstances of disobedience to the rule will occur, differing from those to which the known law of remedy applies. The state must, therefore, in order to effect its intention, i. e., justice, either directly prescribe a remedy in those new circumstances, or direct that its tribunals should go beyond precedent in the law of remedy, and enforce the rule of action according to its original intention. The state may establish a *separate tribunal* with power to carry out the rule of action beyond the remedy given by the precedents of existing tribunals.

In course of time, the remedy given by the new court becomes also a precedent; and has a law of its own. There are thus two systems of remedy intended to carry out one and the same law of right. In English and American jurisprudence, this double system of remedy exists. *Equity* is not a different rule of action from *law*; it is a law of remedy.

Papers read before the Juridical Society, Vol. i., Part I., 1855. London: Stevens & Norton. Inaugural Address by Sir R. Bethell, S. G., M.P., p. 8—"And the rules and maxims of the common law were so broad and comprehensive, that they admitted of being made the basis of an enlarged system of jurisprudence. A portion of the statute of Westminster the second (13 Edw. I.) was passed with a view of effecting this object, and of expanding the maxims of the common law, so as to render it applicable to the exigencies of an advancing state of society. For this purpose, new writs were directed to be framed, as new occasions for remedial justice presented themselves; and if this had been fully acted on, the law of England might have been ma-



It is this which constitutes the common law in the jurisprudence of England and America, when distinguished from statute law.

§ 36. This recognition and adoption of the natural law occurs in international as well as in municipal (national) law.

As was before said, each nation being independent of other nations, whatever is enforced by its own tribunals as law rests upon its own authority, or is identified, in respect to its authority, with the municipal law of that state. International law, though differing from municipal law in the objects or relations which it affects, does not, as administered by its tribunals, rest on any other authority than the state itself: it is then a part of the municipal (national) law; being then distinguished from other portions of the municipal law only by its application to persons, or as one personal law is distinguished from another.<sup>1</sup> Whatever rules the tribunal may administer as international law, are

tured into a uniform and comprehensive system. For it was justly observed by one of the judges in the reign of Henry the Sixth, that if actions on the case had been allowed by courts of law as often as occasion required, the writ of subpoena would have been unnecessary; or, in other words, there would have been no distinctions between courts of law and courts of equity, and the whole of the present jurisdiction of the court of chancery, would have been part of the ordinary jurisdiction of courts of law."

See on this point, Story; Equity Jurisprudence, vol. I. Bacon: Advanc. Learn., B. viii., c. 3, of Univ. Just. Aphorisms, 22 to 46. Ram on Legal Judgment, ch. ii., and authorities; also, Am. Jurist, vol. xvii., p. 253, on reform in remedial law. D'Aguesseau: Œuvres, Tom. i., p. 209. Lessee of Livingston v. Moore and others, 7 Peter's R., p. 547. Butler's Horæ Juridicæ, p. 44—46.

In the states of Continental Europe, where the administration of justice is on the model of the Roman law, judicial tribunals are less fettered by judicial precedent, and have always had a greater latitude in applying the rule of action. The judicial officer has in practice a large share of administrative power. His power to make law for future cases is less than that of judges under the English system; but his autonomous or discretionary power over the case in hand is far greater. Hence the rights of individuals depend less on pre-existent law, and more on arbitrary discretion.

<sup>1</sup> Sir H. Finch: Treatise, p. 74. Sims' Case, 7 Cushing R., p. 313. Shaw, C. J., using the term *positive law*:—"and this may be mere customary law, as well as the enactment of a statute. The term 'positive law,' in this sense, may be understood to designate those rules established by long and tacit acquiescence, or by the legislative act of any state, and which derive their force and effect, as law from such acquiescence and legislative enactment, and are acted upon as such, whether conformable to the dictates of natural justice or otherwise." And comp. Neal v. Farmer, 9 Georgia R., 581.

Ram, on Judgment, ch. ii. Savigny: Heut. R. R., § 18. Reddie's Inq. Elem. &c., p. 238—252,—a description of the establishment of municipal (national) law, abridged from Savigny.

Bentham: Princ. Morals and Legial., pref., xiii. "Common law, as it styles itself in England; judiciary law, as it might more aptly be styled everywhere," &c. Compare Ency. Am., vol. vii., Appendix, Law, &c., by Story.

Co. Lit., fo. 11., a. An enumeration of the "proofs and arguments of the common law," drawn from twenty several fountains or places; common law being taken in the limited sense; because in the same place *communis lex Angliæ* is included *en la ley*.

<sup>1</sup> See *post*, § 53.

derived by it in the same manner as municipal law; viz. firstly, from the positive legislation of the state in reference to relations which are international in their character; that is, relations arising out of the existence of foreign states, and from the recognition of their authority to give laws and hold jurisdiction over persons and things. Such legislation must be recognized by the tribunal on the authority of the state alone to which it belongs, whether it be made by the state singly, or jointly with other states, in the form of treaties and agreements. Secondly: from the recognition of natural law by such criteria or expositions of that law, applied to the same international relations, as may be supposed to be adopted by the state to which the tribunal belongs, and whose will it executes in the administration of international law as well as of the municipal: and these are the same as are adopted in ascertaining the municipal law—decisions of preceding tribunals having the same national authority, the writings of private jurists, and the laws and decisions and customs of all other states;<sup>1</sup> comprehending herein, also, the recognition of universal jurisprudence, the science of a *law of nations* historically known: which recognition by judicial tribunals is particularly manifest and necessary in the administration of private international law, as will be shown in the following chapter. International law, thus applied by the *judicial tribunals* of any state, is only to be distinguished from the municipal law of that state in the *nature of the relations* which it affects; it is identified with it in respect to its *authority* over all persons within the jurisdiction of the state.<sup>2</sup>

<sup>1</sup> Grotius: B. et P. Proleg., § 40, Lib. I., c. i., § 12, 14. I. Kent's Comm., 18, 19. Reddie: Hist. View L. of Marit. Com., 26, 27, 426, 429. Hoffman's Course of Legal Study, vol. i., p. 415-16. Burge: Col. and For. Law, vol. i., xvi. Ram, on Legal Judgment, p. 94. Phillimore: Internat. L., p. 61.

It is only civilized nations, or those of a certain kind of culture, that are thus recognized by their several tribunals as the sources of universal jurisprudence. See Selden: De J. Nat. &c., Lib. i., c. vi., who designates them as "*gentes moratiores*," in the language of Grotius: B. et P., Lib. i., 12, 2. Phillimore: Int. L., c. iii. Heffter designates his work—Das Heutige Europäische Völkerrecht.

This discrimination between different nations as sources of jural rules, is not an *a priori* assumption by the tribunal making it. It is rather a part of the customary law of the state whose will the tribunal is bound to apply. This act of a judicial tribunal must not be confounded with the sovereign *legislative* act of a state in adopting a foreign law, as when in the XII. tables, the Romans adopted some of the laws of Greece. Dig. L. I., Tit. 2, c. 2, § 4; "*petenter leges a Græcis civitatibus*."

<sup>2</sup> This point is more fully considered in the second chapter.

§ 37. From the conditions necessary to the existence of a relation between states, or from the fact that though composed of natural persons, each subject to the power of society, they have a distinct existence and power of action in respect to each other, as well as in respect to private individuals, any rule which would decide on the relations of states, as such, towards each other, and maintain their correlative rights and duties, would be an international law. But from the nature of states and their mutual independence, there is no such rule, taking the word *law* in the strict sense; and the application of such a rule or law could not be made by the judicial tribunals of any state or nation. A coercive determination of these rights and obligations can be expected only from the autonomic force of the parties to whom this law may attribute them.

But from the reciprocal assertion and acknowledgment which all states or nations have in fact made of principles of natural reason, or from that course of practice which is supposed to be founded on a reciprocal reference to such principles in their relations with each other, and from the consideration actually allowed to the ethical views of some private authors in reference to such national practice, an exposition of natural law has arisen, which corresponds with the common law, or judicially ascertained municipal (national) law of any one state, having in practice the character of a rule of action for states; determining their relations to each other, and the correlative rights and obligations of each, though there is no tribunal to decide between them in its application;—that is, no tribunal which can enforce the rights and obligations, arising under it, in particular cases.<sup>1</sup>

§ 38. Rules thus recognized form a part of universal jurisprudence, (*law of nations* in that sense,) to which states or nations reciprocally refer as to an international law having an existence

<sup>1</sup> Even Mr. Reddie, who distinguishes the existence of a universal jurisprudence operating as part of the coercive private law of each several nation, seems to hold that there is a law derived in the same manner, and operating on the state as a political person, having the same kind of authority. See *Inquiries Elem. &c.*, 2d ed., p. 456, and *Inq. in International Law*, 2d ed., 439, 456.

Wheaton, in his *El. of International Law*, § 10, cites Heffter as taking the same view; but in the last ed. of *Das Europäische Völkerrecht der Gegenwart*, Berlin, 1855, p. 2, n. 2, the latter author says that Mr. Wheaton has misconceived his meaning.

independent of their several juridical assent. In its *origin*, this law, of which nations are then taken to be the subjects, is identified with the law applied by judicial tribunals as an interpretation of the law of natural reason between private persons, in both municipal (internal) and international law,—the *law of nations*, in the sense of private law judicially recognised because existing among all nations. And though it is *a law* for those nations only in the imperfect sense of the word, it may be called a part of *positive* law, or be included in jurisprudence—the science of positive law, when the term *positive* is used not to indicate the coercive quality, but the quality of being an ascertained rule,—a rule having an *objective* existence independently of the *subjective* conception of any one state or nation, or of any private person or persons; a rule which is not necessarily the true law of nature or of natural right, but that which many states have agreed in applying for such.<sup>1</sup> As such it is referred to by sovereign nations for public law, and is enforced by judicial tribunals for private law, being binding on those tribunals until contravened or disallowed by the several juridical action of the states to which they belong, or for which they exercise the judicial function.

§ 39. It is always consistent for sovereign powers to reconsider their own previous judgment in respect to any application of the law of nature. This may be done by single sovereignties in either division of the municipal (internal) law, constituting, in private law, social change or reform,<sup>2</sup> and in public law, civil or political change or revolution: in either of which forms the

<sup>1</sup> The controversial writings of publicists on these questions of definition are noted in all the treatises on international public law. Though it may be difficult to estimate the actual influence of professed metaphysicians on these subjects, (compare Wheaton: *Hist. of the Law of Nations*, p. 749, and Heffter: *Europ. Völkerr.*, § 9,) it is probable that the distinctions made by Kant, Fichte and Hegel, in their juristical writings, have led to a greater accuracy of expression on these topics. It is worthy of notice that the positions taken by some later authors correspond in a remarkable degree with those of Suarez the Jesuit, one of the earliest writers. That attention to them has been renewed is shown by the proposal of M. Greuse, of Brussels, to republish the entire works of Suarez.

<sup>2</sup> B. Constant: *Cours de Politique*, Œuvres, Tom. i., p. 174, n. "Souvent les dépositaires du pouvoir sont partis du principe que la justice existait avant les lois, pour soumettre les individus à des lois rétroactives, ou pour les priver du bénéfice des lois existantes; couvrant de la sorte d'un feint respect pour la justice la plus révoltante des iniquités. Tant il importe sur les objets de ce genre, de se garder d'axiomes non définis."

change may be either gradual or sudden, peaceful or violent.<sup>1</sup>

Or this reconsideration may be made by sovereign national powers in international law ; either in that law which each state applies by its own tribunals to persons in international relations, for the private international law, or those reciprocal rules of intercourse, which, as the parties to be governed by the rule, they may mutually adopt for public international law, (in the imperfect sense of a law.) Both which divisions of international law have been constantly changed and extended during the time of recorded history, according to altered views of natural equity.

Universal jurisprudence or the *law of nations*, whether taken to be a rule determining the relations of states or of private persons, being thus a consequence of the juridical action of states or nations, is always liable to changes, which (from the *a priori* principle before stated, viz. that the legislative action of states is always juridical or jural, that is conformed to natural reason) must be taken to be progress or improvement.<sup>2</sup>

§ 40. Under the preceding view of the nature and extent of the law, every action and relation which is the subject of jurisprudence may be taken to be determined either by international or by municipal (national) law.

The rights of persons, though all *relative* in respect to other persons owing or bound to corresponding obligations, may be distinguished as rights in correspondence with obligations on the part of the community at large, or as rights correspondent to obligations on the part of particular persons.<sup>3</sup>

<sup>1</sup> Revolution is resistance against the *legal* possessor of sovereign power. But it is founded on the assertion of a share of sovereignty, or right of supreme control, in the revolutionist, (a right above *law*,) and in case of success, the change, whether ethically rightful or not, becomes *lawful*, by being the act of the actual sovereign.

<sup>2</sup> Suarez: de Legib. et Deo Legisl., ch. 20, § 6, 8. Doctor and Student, p. 63: "For though the law called *jus gentium* be much necessary for the people, yet it may be changed."

Whewell: El. Mor. and Pol., § 1143. "The law of nations, including in this international law, is subject to the conditions of which we have already spoken as belonging to the law of any one nation. It is capable of progressive standards: it is fixed for a given time, and obligatory while it is fixed: but it must acknowledge the authority of morality, and must, in order to conform to the moral nature of man, become constantly more and more moral. The progress of international law in this respect is more slow and irregular than that of a well guided national law, &c." And compare Savigny's Vocation of our age for Legislation and Jurisprudence, Hayward's Translation, p. 184.

<sup>3</sup> Reddie's Inquiries Elem. &c., p. 171. See citation, *ante*, page 20, note: "But

The first class may be called *individual* rights, as belonging to persons each necessarily or absolutely recognized before the law as individual members of society. The individual rights of persons, (called by Blackstone, *absolute*,) have ordinarily been taken to be three, denominated: the right of personal liberty; the right of personal security; and the right of property.<sup>1</sup>

The second class may be called *relative* rights, as belonging to persons in consequence of a relation established between them and others, not necessarily arising from their being individual members of the community.

These relative rights have been classed as the rights of parent and child; of husband and wife; of master and servant.

Both individual and relative rights, considered with reference to the persons to whom they are attributed, may be called private rights; while, in view of their existence in relation to the supreme power of society or the state, and the persons of whom it is composed, they may also be termed civil and public rights.

§ 41. From the nature of law, in its ordinary sense, including the idea of inferiority and subjection, corresponding with superiority and authority, the term *a right* implies a *liberty* in the person to whom the right is attributed; *jus est facultas agendi*. The idea of *freedom* associated with the idea of *law*, or legal freedom, as the *condition* of a person, consists in the

though rights and obligations are in reality and correctly, the relations of individual persons to other individuals, they are plainly correlative terms. And it is manifest, in the first place, that they may exist between any one individual, or a definite number of individuals, and all other individuals generally and indefinitely, the right being positive against all others, *adversus omnes*, and the obligation on all others being only negative. Or they may exist between particular individuals, and instead of being *adversus omnes*, directed against all other individuals indefinitely, may exist or be directed only against one or more particular individuals, who are under corresponding obligation, not merely negative not to interfere, but positive to do, or bear, or suffer something for the behoof of the person having the right." And see Austin: Prov. of Jurisp., Appendix, xxiv., xxv., definitions of rights *in rem* and *in personam*. Also, Mackelvey: Compend. Mod. Civil Law, Introd., §§ 15, 16.

<sup>1</sup> Dr. Lieber denominates such rights *primordial*. Pol. Eth., vol. i., p. 218. Civil Lib. and Self Gov., vol. i., p. 52. The terms absolute or primordial convey the idea of rights anterior or independent of positive law as herein before defined: rights existing under some independent law of nature: which, as before shown, has no existence, —no judicial recognition in jurisprudence, as independent of positive law. *Primordial* is a term liable to the same objections which Dr. Lieber advances against the term *absolute* in the place referred to. He also uses the term *individual* as a synonym. P. E., vol. i., p. 402: "We speak of individual primordial rights." *Droits individuels* is a common term in this sense with the French jurists. Ahrens: Naturrecht, p. 160. speaks of *Individuellen Rechte*.



possession of legal rights of action, or in that liberty which is allowed by law.

Where liberty is attributed to a being existing under conditions over which it has no control, it cannot be defined except with reference to those conditions, or laws in the secondary sense of the word law. And when attributed to a moral being governed by rules of action, (laws in the primary sense,) liberty can be defined only by stating the source, authority, and extent of those laws, as well as their object, or the direct effect of their injunctions.

§ 42. The definition of liberty, when attributed to individual members of a state or political body, has been a problem for publicists.<sup>1</sup> There are evidently two modes in which such liberty may be conceived of. In one, liberty is determined by ethical considerations, or as that freedom of action which *ought*—in accordance with the nature of man—to be the effect of the laws of a political state. This is a *subjective* apprehension of liberty, because the moral judgment of the concipient is the highest criterion of its real nature, and the test of its very existence.

In the alternative mode of conception, liberty is the object of a legal apprehension. That is, it is viewed as that actual degree of freedom which *exists*, or is allowed to the individual member of the civil state under the power of society and the unalterable conditions of human existence. Its conception is entirely independent of the moral sense of the concipient, and may be said to be the *objective* apprehension.

Liberty, in the first named aspect, is a subject of that science which relates to that necessary condition of man's existence as a moral being; and belongs to the province of political ethics. It is in the last described point of view that it becomes a topic of jurisprudence, in the sense herein before given to that term, viz. the science of positive law. No definition of liberty, when thus regarded, can be given but by defining it as the effect of the law of some state or nation, and without describing the law of some state or independent political society.<sup>2</sup>

<sup>1</sup> See Lieber: On Civil Liberty and Self Government, ch. ii., and the citations.

<sup>2</sup> Compare Dr. Lieber: Civil Liberty and Self Government, ch. iv., v. Therefore,

§ 43. Since the nature of a legal right implies a duty or obligation as a correspondent constituent of some relation between persons, that obligation or duty may be considered as the opposite of a liberty: or, the duties made obligatory upon a person by law may be said to constitute a *condition* opposed to legal freedom. As the *condition of freedom* in this sense is indefinite, and is determined according to the nature and extent of the rights given by the law, so is all that is in this manner opposed to it determined by the nature and extent of the obligations or duties imposed by the law.

When a state of freedom, in this sense, is attributed to any subject, a power of choice and action is, by the signification of the words, necessarily supposed to exist in that subject, in the absence of law limiting or defining that freedom. According to the use of words, freedom cannot be predicated of anything which is without powers of choice and action. Therefore, according to the definition of a *person* in jurisprudence, (*ante* § 21,) freedom can be attributed to *persons* only. The same may be said of any state or condition opposite to freedom; only *persons*, as having the power of choice and action in the absence of restraint, can be said to be *bound* by law, (in the primary sense;) and, therefore, *bondage*, as expressing a condition opposite to freedom, can be properly ascribed to *persons* only.

§ 44. The individual and relative rights of persons are capable, under the supreme power of the state, of such various modification between the extremes which constitute on the one hand a state of license, and on the other, the extremity of coercion which is physically possible, that the laws of freedom and bondage, as constituting opposite conditions of legal *persons*, might be considered under the description of these various rights and their corresponding obligations, as they exist under municipal (national) and international law.

a presumption in favor of the personal liberty of any private person is not a necessary principle in jurisprudence. There may be in some states a constant legal presumption against the freedom of certain persons, and hence a presumption that some other person must have over them a right of control. The law, in resting on the authority of civil society, can derive no rules of action, and therefore no rights or obligations, from that state of nature which some authors have supposed to have existed anterior to civil society or the state. The *natural* freedom of man is known in jurisprudence only so far as it is the result either of laws in the secondary sense—conditions of things, or has been acknowledged and realized in the rules of natural reason which are identified with positive law.



But since the *non*-possession of legal rights may be said to be the opposite of freedom, and since *things*, in the idea of the law (being only the objects of action, and never the subjects of rights) can have no legal rights, every object which the law contemplates as a thing, may, by a somewhat loose use of language, be said to be in a legal condition opposed in the farthest degree to freedom. Positive law being necessarily understood to be a rule of action for mankind,<sup>1</sup> it might from this alone be inferred that the law attributes capacity for choice and action, or personality, to all men; or that the legal personality of all men is to be taken as a necessary or natural first principle of all law resting on the authority of society, or of the states holding the powers of society. But in accordance with the proposition that there is no other *legal* criterion of natural law than such as is sanctioned or adopted by the state, there is room in the jurisprudence of every country for an inquiry into the absoluteness or extent of such legal recognition of mankind as persons,<sup>2</sup> or for the question, whether some part of mankind may be legally wanting in the character of personality, distinguishing them from things, and may be in legal relations, *things*;—only the objects of the rights of persons, and never the subjects of rights.<sup>3</sup>

<sup>1</sup> Dig. L. 1. Tit. 5, § 2. Quam igitur omne jus hominum causa constitutum sit,—Inst. L. 1. Tit. 2. § 12—param est jus nosse, si personæ, quarum causa constitutum est, ignorentur.

<sup>2</sup> Thibaut : Syst. d. Pand. Rechts.—Vol. 1. § 118. Tr: “The third topic which is to be considered in relation to rights and obligations is their subject, that is to say, the person who has the capacity or obligation. And here the question directly arises: who can be the subject of a right,—either in respect to the nature of the thing (natural capacity for rights) or in respect to the precepts of positive law, (civil capacity for rights.) He who in any respect is considered as the subject of a right, is to that extent denominated a *person*; particularly considered as the subject of civil rights. On the other hand, that is called a *thing* which constitutes the opposite of a person: civil capacity for rights is what the Romans call *status* or *caput*. The moderns give it the name of *status civilis*, as consisting of all the capacities attributed by the laws, to which particular rights are attached; the natural capacity for rights on the other hand, as consisting of physical capacities which are followed by particular relations, is called by them *status naturalis*.” Compare Lindley’s Transl. § 101. Mackeldey’s Comp. by Kaufmann, § 116, 117. Ahrens’ Naturrecht, p. 83, 84, also published in French.

Falck : Jurist. Encyc. § 27. French Tr. “On peut considérer comme une introduction générale la théorie du *Status*, où l’on résout la question de savoir jusqu’à quel point l’état a reconnu la capacité juridique aux êtres humains qui vivent sous sa protection, de manière qu’en leur en supposant la possibilité physique, ils puissent entrer dans certains rapports de droit et y persister. Ce point était beaucoup plus important dans l’ancien droit, que dans le droit actuel; car nous ne connaissons guère aujourd’hui d’autres causes d’exclusions des rapports juridiques, que celles qui les rendent physiquement impossibles.”

<sup>3</sup> In the Roman law the condition of all natural persons as subjects of law was de-

If the law can be supposed to attribute the *legal* character of a thing to that which has a *natural* capacity for choice and action, or which is a *natural person*, the legal condition of that natural person would not be explained by the term *bondage* as above defined; since that presupposes a recognition by the law of a capacity to act or not to act, or of the personality of that which is legally *bound*. That condition would be legally included under the law of things, or of the rights of persons in respect to things: property, or possession and control by legal persons, being the essential legal attribute of a natural person who can appear in legal relations only as the object of rights, while the attribution of legal personality, by implying capacity for choice and action, recognizes a legal capacity for individual and relative rights, and makes every condition of the person which may be opposed to freedom, to consist in *obligations* under relations to other persons. But where the law admits the contradiction of recognizing a natural capacity for choice and action, and at the same time attributing that incapacity for rights which belongs to the nature of a *thing*, this species of bondage would require a legal name distinguishing the subject from natural things and from legal persons.<sup>1</sup> Under systems of law where this anomalous condition has been known, it has been included under the general terms bondage or slavery, and is sometimes more definitively known as chattel bondage or chattel slavery.<sup>2</sup>

scribed under the name of *caput* or *status*, and divided into three parts; or rather described as existing under either one, two, or three conditions, each called *status* or *caput*, under each of which the condition of the individual might be variously affected. These were called *libertas*, *civitas*, *familia*. The law of the *status libertatis* however comprised the distinction between a personal condition as *liber* or freeman and the chattel condition of a *servus* or slave; and the law of the *status*, in its most general sense, may be taken as the Roman phrase for the law of freedom and of bondage. For the sake of a convenient term, it will be here sometimes used to designate the legal condition of a private person, considered under the American law affecting personal condition in these respects. See Thibaut, by Lindley, § 106. Mackeldey, by Kaufman, § 119, 120, 121.

<sup>1</sup> Novel Theod., Tit. 17, "Servos . . . quasi nec personam habentes."

<sup>2</sup> Austin: Prov. Jur., p. 279, note. "From the assumed inconsistency of slavery with the law of God, or nature, it is not unfrequently inferred by fanatical enemies of the institution that the master has no right, or cannot have a right, to the slave. If they said that his right is pernicious, and that therefore he ought not to have it, they would speak to the purpose. But to dispute the existence, or the possibility of the right, is to talk absurdly. For in every age, and in almost every nation, the right has been given by positive law; whilst that pernicious disposition of positive law has been backed by the positive morality of the free, or master classes." "Positive law," according to this author's definition, which includes every rule that is law, not legislative enactment merely.

§ 45. The idea of chattel slavery, in the strict legal sense, is definite and easily conceived. When the term slavery is used to express the condition of a *legal person*, one having a recognized capacity for rights and duties, it may be attributed to various conditions of obligation on the part of one person opposed to the conditions of privilege on the part of others. Chattel slavery may exist under restrictions by municipal law on the power of the master, in view of the interests of society, without vesting the rights of a legal person in the slave.<sup>1</sup> The person held in slavery may continue to have the character of property, in the eye of the law, in states wherein, under the influence of public opinion or other moral causes, protection is in practice ensured to the slave as a natural person, unknown to other communities wherein the law upon which the relation rests is the same in judicial apprehension. By a greater or less legal recognition of rights in the slave, and of corresponding duties on the part of the master or owner, the fundamental character of that condition may be changed, and the property recognized by the law be made to consist in the right of one person to the labor or services of another. Every recognition of rights in the slave, independent of the will of the owner or master, which is made by the state to which he is subject, diminishes in some degree the essence of that slavery by changing it into a relation between legal persons.

§ 46. The term slavery has been popularly applied to various forms of servitude or bondage, instituted under municipal law. But in its general legal acceptation it may be defined as that condition of a natural person, in which, by the operation of law, the application of his physical and mental powers depends, as far as possible, upon the will of another who is himself subject to the supreme power of the state,<sup>2</sup> and in which he is incapable, in the view of the law, of acquiring or holding property, and of sustaining those relations out of which *relative* rights, as herein before defined (§ 40) proceed, except as the agent or instrument

<sup>1</sup> Savigny: *Heut. R. R.*, B. ii., c. 2, § 65.

<sup>2</sup> But the legal condition of slavery may exist, even though the person to whom it is ascribed is not the bondman, or property of any particular person, or master. See Savigny: *Heut. R. R.*, B. ii., c. 1, § 55, note, a), c. 2, § 65, for illustrations under the Roman law.

of another. In slavery, strictly so called, the supreme power of the state, in ignoring the personality of the slave, ignores his capacity for moral action, and commits the control of his conduct as a moral agent, to the master,<sup>1</sup> together with the power of transferring his authority to another. So far as it may hold the master and slave, as individuals, morally responsible to the state in their mutual relation, it so far recognizes the personality of the slave, and changes the property into a relation between persons.

§ 47. It is evident that there may be political or economical regulations in a civil state which, while not interfering directly with the freedom or security of the person, or denying the abstract right of any to the acquisition or enjoyment of property, may yet, in view of public or of partial interests, by prohibition of certain modes of action, or by the grant of superior privileges to others, so obstruct the industry of some classes of persons and repress their moral and physical energies, as to make their actual condition in the social scale lower than that of others living under the control of a private master who is guided in its exercise by wisdom and benevolence.

Municipal laws may so operate in disabling certain classes or races in a nation, with respect to their private or public relations, as to reduce them to a species of dependence upon more privileged classes deserving, in a general sense, the name of slavery or bondage.<sup>2</sup> The distinction of these cases from slavery, properly so called, lies in the legal view of the slave or of his labor as private property, and the greater or less denial of his personality, making the disposal of his person and labor to depend

<sup>1</sup> Menander apud Stobæus: Florileg lx., 84.

Ἐμοὶ πόλις ἐστὶ καὶ καταφυγὴ καὶ νόμος  
καὶ τοῦ δικαίου τοῦ τ' αἰδίου παντὸς κριτῆς  
Ὁ δεσπότης. Πρὸς τοῦτον ἕνα δεῖ ζῆν ἔμε.

Spinoza: Tr. Theol. Pol., c. xvi. "Si finis actionis non est ipsius agentis sed imperantis utilitas, tum agens servus est, et sibi inutilis."

<sup>2</sup> For illustrations of the variety of meaning attached to liberty and slavery, see 20 Howell, State Trials, Somerset's case, p. 14, note of English editor, sneering at the boasts of the French lawyers in the negro case, 13th vol. of Causes Celebres, (temp. Louis XV.,) p. 492, ed. 1747. And compare Chancellor Harper's Essay, p. 28. See Molyneux: Case of Ireland, by Almon, p. 169. "I have no other notion of slavery but being bound by a law to which I do not consent." In defining liberty, Dig. Lib. i., De statu hominum, Inst., Lib. i., Tit. 8, De jure personarum,—Libertas est naturalis facultas ejus, quod cuique facere libet, nisi si quid vi, aut jure prohibetur—the very *idea* of law is excluded.

on the will of a single private individual, and not on a law proceeding immediately from the supreme political power.— Under a system of caste personal liberty and the right of property are controlled by laws restraining the activity of a class of persons, more or less strictly defined, to a particular course of life, and allowing only a limited enjoyment of property and relative rights. Feudal slavery confines the person to a particular locality and a subordinate range of action. There is therein a certain degree of freedom within assigned limits, and the servitude is due rather to the state than to a single master, being the result of distinct laws more or less oppressive according to their nature and number.

§ 48. From what has been before said of positive law, in its most comprehensive sense, it appears that its existence in any one country, or nation, may be referred in its *origin* either to the legislation of some one possessor of sovereign power, (*positive* law, in the restricted sense,) or to the judicial recognition of principles founded in natural reason; while its *authority* in any particular territory, and at any particular time, depends upon its being then and there supported by some one such possessor of sovereignty, whose existence and authority is independent of *law* in the ordinary sense. And, since, in the present condition of the world, being entirely occupied by nationalities of some sort, the actual extent of that territory over which any possessor of sovereignty shall exercise dominion results from the public international action of different states, it may be said to be *determined by* international law; though it is a fact taken in jurisprudence to be independent of the will of every other national power than that which is, within that territory, the source of the municipal (national) law, both public and private.

Or, more strictly speaking, those principles which apply to, and are said by way of analogy to be a *law* for the action or intercourse of nations, and which are public or private international law, according to the character of the persons upon whom they operate, may be taken to be divided into two portions. The first consisting of principles which are not laws in the primary sense, or not rules of action, but laws in the secondary sense only,—the statements of the mode of existence or of

action of states, or political bodies: which must essentially be acknowledged in every national jurisdiction as axiomatic and basal principles: (and which, therefore, enter also into municipal law.) The second portion consisting in rules of action, laws in the primary sense, which do not necessarily have the same universal recognition and extent; but which, if received by any states, or nations, regulate the reciprocal action of those states, or nations, and of the individuals of whom they are constituted, supposing such reciprocal action to take place. Each of these portions is public law, in reference to its effects on the relations of the state, or nation, regarded as a political unity, and private law, so far as it defines or affects the relations of private individuals.<sup>1</sup>

§ 49. The first of these portions of international law, (also entering into municipal law,) is expressed in the definitions of such terms as these,—a nation; a sovereign; sovereignty; jurisdiction; *forum*; national territory; domain; subjection; native subject; domicil; alien; alienage, &c.; which are terms necessarily used in the exposition both of municipal and international law. These terms are statements of the mode of existence of nations, or states, derived from the general reasoning of mankind in the social condition, independently of the legislative authority of any one of the states, nations, or political communities whose existence is defined by them. So far as these statements are constituent parts of positive law,—international, or municipal rules of action,—they belong to those principles which are judicially recognized as having the character of *universal law*, (herein also called from its universality the *law of nations*.) Although these principles are necessary axioms of all positive law, international or municipal, they are more frequently called principles of the law of nations in view of their application to the public existence of nations than in view of their origin and universal character. They form what has been frequently denominated, in reference both to their origin and application, “the natural, or necessary law of nations,” and have been

<sup>1</sup> Bowyer: Univ. Pub. Law, 22. Therefore Hermogenianus, Dig. L. 5. De Just. et Jure, describes civil society, and the necessary transactions among men, as springing from *jus gentium*, by which he means natural law; or that which, in the words of Gaius, *naturalis ratio inter omnes homines constituit*.

classed with international rules of action in works which treat of that law of which nations are the subjects, because it is only in international relations, public or private, that they become subjects of judicial cognizance.<sup>1</sup>

§ 50. The second portion of international law consists in whatever rules of conduct nations may observe towards each other, or enforce between the individuals of whom they are respectively composed. This part of international law is more arbitrary, or has not that necessary existence which is ascribed to the first portion, being dependent upon the autonomic juridical action of states; it is, therefore, appropriately denominated positive, or practical international law.<sup>2</sup> But these international rules between nations are based, as also the municipal law of each, on the recognition of the definitions of their existence as nations: (which, by being so universally received, are judicially taken to belong to the universal principles, otherwise herein called *law of nations*.) The distinction in the use of the terms *international law*, and *law of nations*, which is to be here observed, is this:—*international law* is a law defined with reference to its jurisdiction, or application;—the *law of nations* is a law defined with reference to its origin, or historical character.<sup>3</sup>

§ 51. It is the first portion, then, of international law to which the existence, authority, and domain of any one state, or nation, is to be attributed in a legal point of view, and not those rules of action which are here called the second portion. Because, in the theory of jurisprudence at least, the existence and power of each nation is taken to be independent of those rules; or the rules themselves are a consequence of that existence, authority, and domain.

The laws, or rules of action for private persons, which are to prevail under the jurisdiction, when thus determined, of any state, or nation, are ascribed to the authority of the state as a politi-

<sup>1</sup> Reddie: *Inq. in International Law*, 2d ed., pp. 119—130. Vattel: *Prelim.*, § 8. Bowyer: *Univ. Pub. Law*, pp. 11, 12. Some writers may, however, have employed it to signify natural equity applied to the international relations of states. See 2 Browne, *Civ. and Adm. Law*, p. 13—15.

<sup>2</sup> By Von Martens: "Positives oder practisches Völkerrecht." Compare an enumeration of the various synonyms used by different authors to designate these two parts of international law in *Amer. Jurist*, vol. xx.; article by M. Victor Foucher.

<sup>3</sup> Reddie: *Inq. in International Law*, 2d ed., p. 410.



cal person, or to the possessor of that sovereign power in which the state consists, whether they are applied as municipal (national) or international private law; or, in other words, whether they are applied with or without reference to the existence, or juridical action of other states, or nations.<sup>1</sup> These laws are the *proper*, or peculiar law of that state; and in being confined to its limits and jurisdiction are known as the local, or territorial, or national law; or, what has been termed the "municipal law" in English and American jurisprudence, at least since the time of Blackstone.

§ 52. An exposition of the law prevailing within the territorial domain of any one country, or nation, is, therefore, necessarily always historical;<sup>2</sup> consisting in a statement of the existence of a possessor of sovereign national power, and of the exercise of that power in promulgating rules of action for private persons, either by positive legislation, or by judicial action, under its authority; and the law is necessarily described both as public and private law.

§ 53. Whatever rules of action are enforced within the domain of any one state, or nation, as its local, territorial, or national law, may apply to persons within that jurisdiction, according to any distinctions which the supreme power of that state might recognize among them; that is, the local law, by being applied to different persons according to those distinctions, becomes distinguished into different personal laws.<sup>3</sup> These distinctions may arise from principles which are connected with

<sup>1</sup> Bowyer: Univ. Pub. L., p. 156. "The general principle of modern times is that the territory determines the law, and the law of the territory regulates the property and contracts of all who inhabit the country. In this respect citizens differ little from foreigners, and national origin has no influence. (Savigny: Hist. R. L., French Tr., vol. i., p. 89.) We denote this state of things by the common expression, *the law of the land*, meaning the territorial law."

<sup>2</sup> Whewell: Elem. Morality, &c., B. ii., ch. vi., 209, 215. Reddie's Inquiries Element, &c., 24, 25. Hegel: Grundlinien der Philos. des Rechts, § 212. Tr.: "The science of positive law is to a certain extent an historical science, which has its beginning in authority, (or which begins by recognizing authority.)"

Mackeldey's Compend., § 8. "*Positive law* is the law established by historical facts, or the sum of those principles which are acknowledged in a state as principles of law, and consequently have authority as such."

In the exposition, or teaching, of jurisprudence—the science of positive law—two schools are recognized—the analytical and the historical. But there is not any real antagonism between them. See Reddie's Inq. EL, p. 88.

<sup>3</sup> Ante, § 25. Duponceau on Jurisdiction, p. 24.



the existence of states and nations, or their mutual intercourse, and which are manifested, or employed in rules having an international application. In this manner, when the international law is applied, or enforced by any state, or nation, upon persons within its jurisdiction, and becomes identified in *authority* with the municipal (national) law thereof, it is at the same time distinguished as a personal law.<sup>1</sup>

In view of this difference of application, the private law prevailing within any national jurisdiction may be distinguished into municipal private law, (which, with propriety, may be called *internal*<sup>2</sup> private law,) and international private law, according to the character of the persons to whom it applies.

§ 54. To illustrate more fully this distinction in the application of the local, or territorial law of any one state to persons:—It is an axiomatic principle of universal law, included in that “natural and necessary law of nations,” which was described as forming the first portion of international law, under the division herein before given, that the effect of sovereign power upon the legal relations of the person is co-existent with the presence of such person within the limits which the public law (international and municipal) assigns to the jurisdiction of the state, or sovereign. This actual presence, and the relation of subjection which is incurred by it, may commence either by the birth of the person, or by his entry from some foreign jurisdiction.

<sup>1</sup> Reddie's *Inq. in Internat. Law*, pp. 463–6. International, as well as municipal law, must also apply to things as well as persons; that is, the rights (with their correspondent obligations) which are determined by international law may be rights in respect to things; but whenever rights, or obligations, in respect to things, are ascribed to international law, as contrasted with municipal (internal) law, the law has a personal extent from the character of the persons who sustain the relations constituted by those rights and obligations.

<sup>2</sup> The law prevailing locally thus becomes distinguished into *internal* and *international* according to Bentham's terminology. Or it might be said to be distinguished as acting internally or internationally, according to “the *political quality* of the persons whose conduct is the object of the law. These may on any given occasion be distinguished as members of the same state, or as members of different states; in the first case, the law may be referred to the head of *internal*, in the second to the head of *international* jurisprudence.” Bentham: *Morals and Legislation*, ch. xix., § 2, (xxv.)

Bowyer's *Commentaries on Modern Civil Law*, Lond., 1848, p. 18. “Thus jurists of modern times have divided public law into *internal* and *external*. The former is that which regulates the constitution and government of each community, or commonwealth, within itself, and the latter is that which concerns the intercourse of different commonwealths with each other: this is properly known by the name of *international law*.”

Thus, there is a natural possibility that the same person may, at different times, be subject to different jurisdictions; and there is in every state a natural and necessary distinction between native-born subjects and alien-born subjects; which, so far, is a necessary, or axiomatic principle. But the different legal relations which make the *legal* distinction between native and alien subjects, or between temporary subjects and domiciled subjects, depend upon some rule of action enforced by the state.

The fact of being present within a particular jurisdiction, with or without concomitant circumstances, might be taken, irrespectively of the circumstances of native, or foreign birth, to be that which should determine the operation of the laws of a state upon persons within its territorial jurisdiction: in which case, the recognition of such fact becomes an axiomatic principle, in determining the relations of persons thus distinguished. A residence, or continuance, under certain conditions, to which it is not necessary here to allude more particularly, is, under the name of *domicil*, actually thus recognized: that is, it is actually taken to have a certain effect in determining the operation of the local law. The local, or territorial law of any one state or country might possibly make no distinction, between persons subject to its authority, in respect either to the circumstance of native or alien birth, or to that state of circumstances which is known as domicil: and if it were possible that there should be no recognition of legal rights and obligations arising out of relations caused by previous subjection to another dominion, there would, in that case, be no manifestation of international law, operating as private law.<sup>1</sup> When the local or municipal law is spoken of as applying territorially, without reference to persons as alien and native, or alien and domiciled, it is contrasted with international law—taken in the sense of a rule of which states are the subjects.

But when the rights and duties of private persons within any national dominion differ according to the circumstance of domicil or alienage; or vary as they may or may not have been subject to a foreign jurisdiction, the local or national law

<sup>1</sup> Bowyer: Univ. Pub. Law, 151-3.

is spoken of as applying differently to the persons so distinguished: and in acquiring the character of a personal law, (in contrast with a territorial law,) may be itself divided into strictly municipal, (or internal), private law, and international private law; though each part rests on the same political authority: and the condition of private persons, whether regarded as the subjects of rights and duties, or as only objects of action, (ante, § 21), is a necessary topic of one or the other of these divisions of the local, municipal, civil, or national law of each country.<sup>1</sup>

§ 55. According to what has been before said, every law determining the relations of natural persons, whether alien or native, is to be ascertained either from positive legislation, or by judicial recognition of laws founded in natural reason, and identified with the will of the state, (§ 29.) The autonomous decree (*esto*) of a sovereign power may attribute any rights or obligations, (being restrained only by the necessary conditions of things—§ 6,) to particular persons, or may attribute them generally to all persons within the territorial jurisdiction of that sovereign source of law.<sup>2</sup> The tribunal, which administers law as the pre-existing will of the state, is restricted to declaring what law *is* (*videtur*), and in the personal extent which it gives to laws must be guided by certain existent criteria.

The ascertained will of the state is binding on all within its jurisdiction; though it has unequal effect upon different persons; creating different rights and obligations, in relations in which they are the subjects of rights and duties, or the objects of action. The action of men in society being different, the relations, rights and duties of all cannot be alike.

But an individual or absolute right may be ascribed by the law of a country to any number of natural persons within its domain, though it must be exercised by each, relatively to different persons and things—the objects of action.

<sup>1</sup> Mr. Reddie uses the term *internal* law as synonymous with that law which he calls the national law—Blackstone's municipal law,—and thus loses the benefit of the distinctive term *internal* to mark this division of the national (municipal) law according to its application to different persons. See Inq. Elem. &c., p. 97.

Compare Massé: Droit Commer., Tom. i., § 87, and §§ 57–60, defining *le droit civil*, including *le droit commercial*.

<sup>2</sup> Compare *State v. Manuel*, 4 Dev. & Batt., N. C. Rep. p. 28.

§ 56. Such a right may attach to all domiciled persons, or to all alien persons. A certain condition or *status* of natural persons, whether consisting in rights and duties of a legal person, or in a chattel condition, may, whether determined by positive legislation or by a judicial application of natural reason, be the effect of either municipal (internal), or of international law, or of both; the extent, or application to persons, of a law originating in positive legislation, depending upon that legislation only; and there being no necessity for supposing that the dictates of natural reason on this point will be the same, in rules of action applying to alien persons, as in those relating to the native or domiciled inhabitants of any supposed national jurisdiction.

§ 57. Or the state, or supreme power, may attribute any individual right or rights to each natural person within its domain, whether domiciled or alien. In this case, the law attributing those rights, would, in the jurisprudence of that state, be a *universal* principle in respect to its *personal extent*; that is, in applying equally to each natural person. In this case, the *individual* rights so attributed are not only distinguishable from *relative* rights by existing in respect to the whole community, independently of relations towards specific persons and things, (ante, § 40,) but they may be called *absolute*, or *primordial*, or *natural* rights, because the law attributes them to natural persons simply as such, or as beings possessing the human form and nature, and as an intrinsic element of their human character.

§ 58. The extent of any principle or rule affecting the *status* of private persons is always subject to the supreme legislative power. But in the absence of such legislation, it must be determined by judicial criteria of natural reason as before set forth. (§§ 29 to 36.) Rules or principles determining the condition or *status* of natural persons may be derived from universal jurisprudence. But it is to be borne in mind, that, in being so derived into the jurisprudence of any one state, they do not, therefore, have the universal *personal extent* which is above spoken of. This *extent* of a personal law being dependent upon the will of the state in which it is applied; while a uni-

versal *character*, ascribed to any principle, has reference to its juridical source or origin ; that is, depends upon the fact of its having been applied by *all nations*, or the greater part, (ante, §§ 36—38 :) which application may have been in respect to a greater or less proportion of persons.

The different extent of laws to natural persons according to their subjection at different times to different national jurisdictions, and the mode in which, by the application of international law to the relations of private persons, universal jurisprudence may be distinctly recognized, and local or territorial laws, affecting condition or *status*, may receive universal personal extent, will be considered in the following chapter.

NOTE.—The following extract from an Essay by Henry Sumner Maine, LL. D., On the Conception of Sovereignty, and its importance in International Law—Papers read before the Juridical Society, London, June, 1855—p. 26, may, with some readers, serve to justify expressions in the text, which may at first appear to be an attempt after a useless novelty of expression. Speaking of Austin's Province of Jurisprudence Determined, Dr. Maine says, p. 29: "And here, as I have alluded to Mr. Austin's treatise, I trust I may be pardoned for saying that I know no reason, *but one*, why it has not long since dispelled the indifference to the systematic study of Jurisprudence which was so eloquently lamented at the inaugural meeting of this society. [By Sir Richard Bethell, p. 1, of the same tract.] The one drawback on its usefulness has been its *style*—which is such as to repel a superficial reader, and not to attract even a patient one; but it would be foolish not to admit that there are abundant excuses for the peculiarity. England has no literature of jurisprudence; consequently, the English language comprises no true juristical phraseology. Our English law terms are strictly terms of art, and it would be absurd to attempt to strain them beyond their well-defined, long accepted, and technical meaning. The language, then, which must be used for questions of universal jurisprudence is popular language, infected with all the vices of common speech, vague, figurative and general. In employing it for such an examination of these questions as is appropriate to closet study, it is necessary to be constantly limiting and qualifying it, to be perpetually weeding it of metaphor, and to be carefully cleaning it from the misleading suggestions which lurk in mere arrangements of words and collocations of phrase. Among the numberless advantages which may be looked for from an extended study of Roman law, I am not sure that the highest will not be the introduction of a terminology, neither too rigid for employment upon points of the philosophy of law, nor too lax and elastic for their lucid and accurate discussion."

## CHAPTER II.

### FARTHER CONSIDERATION OF THE NATURE OF PRIVATE INTERNATIONAL LAW: ITS ORIGIN AND APPLICATION. ITS EFFECT UPON CONDITIONS OF FREEDOM AND BONDAGE.

§ 59. In the definition of international law which was given in the first chapter, it was shown to have the name of a *law* only by an improper use of the term, when considered as a rule of action for states in their several entity or personality; since, though it consists of a recognized body of rules distinct from the municipal (national) law of each state or nation, it is not prescribed to them by a superior, but operates upon them as political persons, or upon private persons within their respective domain, only by their own several allowance or consent. This being the legal or juridical view of the obligation of that law; whatever may be its source in a divine rule of action, or law of nature. When, therefore, private international law operates upon private persons, in any national jurisdiction, by the allowance of the supreme power of the state, it has, in respect to such persons, the same sanction and force as the municipal (national) law, and, as to all persons who are distinct from the state or sovereign, it has equally the effect and authority of *law* in the proper meaning of the term. The distinction of private international law from private municipal (internal) law arising, not from a difference in the nature of their authority over individuals, but in the character of the relations which they severally affect.

§ 60. When considering, in the first chapter, the mode in which positive law becomes known as the law of some one

state or country (§ 48), the international law was described as being divided into two portions. The first consisting of laws in the *secondary* sense only,—necessary axioms, or definitions of the political existence of states,—entering into both international and municipal (national) law. The second, consisting of laws in the *primary* sense—rules of action—which may, or may not, exist, or be observed, between specified states. The first portion, which, as was remarked in the same place, corresponds with that which is sometimes called “the natural, or necessary law of nations,” but which indicates at the same time relations of private persons, as well as the relations of states, may indeed be taken to be antecedent to, and independent of, the power of any one state: but the rules of action which compose the second portion, whatever authority they may have in natural reason, become *law* for private individuals only by being enforced by the power which promulgates the municipal (national) law of that jurisdiction or state in which the person may be found.

§ 61. If, then, it is asked—wherein does private international law consist, as a rule of action in any one national jurisdiction, distinct from the municipal (internal) law of that jurisdiction?—the answer must be found by ascertaining the effect of the necessary axiomatic principles or definitions composing the first part of the international law, as before described, upon private persons and upon things; and next—the actual allowance or creation of rights and obligations of private persons, as the incidents of legal relations which have an international character from the fact that the agents and objects of action presupposed in them are persons, or persons and things, not altogether or exclusively under the juridical power of a single nation or state: those persons, or those persons and things being discriminated, by the application of the axiomatic principles above spoken of, as persons subject to different jurisdictions; such persons being alien, or native, domiciled, or temporary subjects in reference to some one jurisdiction or *forum*.

§ 62. The terms or phrases by which the nature or mode of existence of states or nations is set forth or defined, are so generally known in the maxims of public law, that it is not neces-



ary here to attempt any separate exposition of them: though it may become necessary hereafter to consider particularly the meaning of some of those terms, as they may be used in stating international or municipal (internal) rules of action.

The general principles or maxims which are contained in the definition of these terms, are set forth most at large by writers who treat of public international law, regarded as a rule of imperfect obligation (*ante*, § 11,) of which states or nations are the subjects; though they are equally presupposed in rules determining the relations of private persons towards those states or nations, and having the force of law in the strict sense—i. e., public municipal (national) law.

§ 63. Upon an examination of these maxims, as stated by writers on public law, it will be seen that there are *three* which may be taken for the most general or fundamental; and which are in fact but one and the same definition of sovereignty;—or they are assertions, in different forms, of the essential character of sovereignty; or, again,—descriptions of sovereign national power in three different relations. The first being a definition of sovereign national power considered, as it may be said, absolutely,—or in relation to its own materials, or constituent parts; without reference to the existence of any other manifestation or embodiment of that kind of power: which may be thus stated:—

*I. The power of every state, or nation, is absolute, self-dependent, or supreme, within that space, or territory, which it possesses, or occupies, as its own domain, and over all persons and things therein.*

The second maxim is but the same assertion expressed relatively to the co-existence of several states, or nations; recognizing the limitation of each by the fact of the equally independent existence of the others; this is, that—

*II. The sovereign power of one state, or nation, is not to be recognized as sovereign, or has no existence, as such, beyond its own domain, or territory, or within the space, or territory, which constitutes the domain of another possessor of national sovereignty.*

§ 64. These two maxims, when taken for maxims of international law, belong to the first portion of international law,



according to the division herein before made, (*ante*, § 48,) since they can be called *laws* in the secondary sense only; not being properly rules of action, but statements of a mode of existence, or of action. They must lie at the foundation of all positive law; and they have in jurisprudence the character, or extent of *universal law*—the *law of nations*, (*jus gentium*,) because actually asserted, or proclaimed, and universally received, by nations, or states, as being natural and necessary principles.<sup>1</sup>

In the manifestation of this sovereign power, over persons and things, by states, or nations, originates *law* in the primary sense—rules of action; forming relations between persons in respect to other persons, and in respect to things. Since these relations are legal,—that is, are known as the effects of law, it is a consequence of the two maxims just stated, that they have existence only in some one jurisdiction in which that law is known as a coercive rule proceeding from the sovereign of such jurisdiction, and the rights and obligations composing those relations have no legal force beyond it.

§ 65. It was remarked in the first chapter that international law (public and private) arises from the necessarily existing circumstance that the whole variety of human interests and action cannot, from their nature, (or, it may be said, from their relation to space and time,) be distinctly divided among, and separately included under the limits of single states; and yet the juridical power of society must be supposed, in some form, either by enjoining, permitting, or prohibiting, to be exerted upon interests and actions which are not so included under the exclusive dominion of single states, (*ante*, § 10.) The effect of law is exhibited in legal relations, comprehending rights, with their corresponding obligations, in respect to persons, and in respect to things. The action involved in any legal relation must take place in reference both to space and time; and the conceivability of relations whose legal existence is indeterminable under the law of a single state, (which conception supposes an international law according to the definition in the first chapter,) will arise from postulates of their existence in respect to space and in respect to time: such relations being, also, dis-

<sup>1</sup> Bowyer: Univer. Public Law, p. 151, and the citations.

tinguishable among themselves by differences in the comparative effect of space and time in connecting their legal existence with the juridical action of more than one state.

For, *first*, relations may be supposed, or conceived, not to be exclusively determinable by the juridical power of a single state, by reason of differences in the respective geographical positions, at one and the same time, of the persons and things which are to be the subjects and objects of the rights therein involved.<sup>1</sup>

And, *secondly*, other relations may be supposed, or conceived, not to be so determinable under the juridical power of a single state, by reason of differences in the respective times at which the persons, or the persons and things, which are to be the subjects and objects of the rights involved in those relations are together found within different geographical jurisdictions: they being at one time within the territorial dominion of one state, and afterwards within that of another.

§ 66. It will be seen in comparing these classes of relations that there is a manifest difference in the degree in which it may be said that they are *not* exclusively determinable under the juridical power (the law) of single states.

In the class of relations first described, the persons and things which are to be the subjects and objects of the rights involved in those relations, not being at the same time under the same jurisdiction, it is actually impossible, from the axiomatic principles of jurisprudence, (natural and necessary law of nations,) that the action in which those rights must be manifested should take place without a concurrent juridical action on the part of the respective states, either producing one common rule, or consenting to the controlling operation of rules proceeding from one or from the other. In this case it may be said that the question—by which juridical power the relation is to be determined?—precedes the legal existence of the relation.

<sup>1</sup> Wheaton : International Law, Part ii., ch. 2. "It often happens that an individual possesses real property in a state other than that of his domicile, or that contracts are entered into and testaments executed by him in a country different from either, or that he is interested in successions *ab intestato* in such third country; it may happen that he is at the same time subject to two or three sovereign powers—to that of his native country, or of his domicile, or to that of the place where the property in question is situated, and to that of the place where the contracts have been made, or the acts executed."

But, in the other class of relations, the persons and things which are to be the subjects and objects of the rights involved in those relations, having been together under the juridical power of one state before the other is supposed to have any possible operation, the existence of a relation between them precedes the question—by which juridical power the legal force of that relation is to be determined?—: and there is not any actual impossibility that the action in which those rights must be manifested should take place without a concurrent juridical action on the part of the respective states; the persons and things between whom the relation is supposed to exist, being, at different times, under the exclusive dominion of some one juridical power.

§ 67. Now from the possible connexion, in respect to persons and things, which is here indicated between distinct sources of law having separate jurisdictions, arises the third of the three fundamental maxims before enumerated; which, like the two already stated, is only a recognition of sovereign states or nations as being the independent sources of positive law, even while stating this possible relation or connexion between them; which maxim may be thus expressed :—

III. *The laws of one nation or state may, by the consent or allowance, and therefore under the authority of the supreme national power in another nation or state, have the effect of law within the jurisdiction of the latter.*

This maxim, it will at once be perceived, is from the meaning of the term *law*, inconsistent, except as it is merely another form of the first and second. For the law—being a rule of action resting on the authority of some one sovereign—if the laws of one state can be said to take effect in the jurisdiction of another, they are in fact the law of the state in which they take effect, and not of the first.<sup>1</sup>

<sup>1</sup> Compare Story's Conf. L., § 21, 22. Fœlix Droit International Privé, § 10, 11.

Schæffner in Entwicklung des Internat. Privatrechts, § 26, cites Zachariä, as saying. (Tr.) "Each right, and in the same degree each obligation, subsists exclusively under the laws of the land in which the right or the obligation (according to the effect of those laws) is to be enforced and is enforced under the supposed circumstances. This rule, (which in fact is merely a reiteration of the well known maxim, *Leges non valent extra territorium*, in the only sense which can be given to it,) is derived, immediately, from the sovereignty of states. For if it should be held that the law of a particular

§ 68. The first two of these three maxims are necessary propositions in defining what sovereign national power is; and lie at the foundation of all positive law—municipal (internal) or international. The third is not *necessary* in the same sense: being the statement of a manifestation of sovereign power which may or may not take place. It is however the statement of a relation or condition only; and therefore, like the first and second, a law in the secondary sense of the word *law*. It is an axiom of public law lying at the foundation of that which is herein before called *private* international law;—so far as such international law can be judicially recognized in any national jurisdiction, as distinct from the private municipal (internal) law of that jurisdiction:—private *international* law;—which, as described in the first chapter, determines the *realization* of the legal relations of private persons in those interests and actions which cannot subsist or have not continued under the exclusive territorial authority of any one state or nationality: (§ 10) which relations, with the rights and obligations of which they are composed, must yet, primarily at least, as is implied in these three maxims, receive their legal *existence* under some one municipal (national) law.<sup>1</sup>

state may, or must, as such, be carried into effect in another state, the legislative power of the former state could be extended over the latter, and in proportion diminish its legislative power;—the chief attribute of sovereignty. It is true that the application and execution of the foreign law would always remain with the judicial and administrative officers of the forum. But the rule according to which these officers would decide and act would have been prescribed by a foreign government. And how can they be empowered to act according to this rule, when they are only the instruments or servants of the government by which they were appointed." To this proposition the same author states three cases of exceptions, allowing them to be such in appearance only. Schæffner calls the proposition a novel one, and denies its correctness. There is probably no real contrariety of opinion between them. Apparently Zachariæ, in discriminating the law to which he should attribute the relation, looks to the political authority which coercively maintains the rights and obligations in which it consists, and therefore speaks of it as subsisting under the law of the forum; while the other looks to the legislator whose moral judgment attributed those rights and obligations to the persons between whom the relation is maintained, and therefore regards the relation as possibly subsisting under the law of a foreign state.

<sup>1</sup> The *realization*—the actualization—the carrying-out of. The term employed for this by some German writers of reputation is—the *Verwirklichung*—the making or the being made *wirklich*—real or actual. Another term nearly equivalent is the *Geltend-machen*—the making *geltend*—available, or in force. And this is distinguished from the *Existenz-werden*—the becoming, or the being made existent. Thus it is said by Schæffner § 27. "A very different thing from the *Existenz-werden*, (the being made, or the becoming existent,) is the *Geltend-machen* (the putting in force, or the being made available,) that is, the assertion that a certain fact (legal effect) has become *verwirk-*

§ 69. The municipal (national) law of any one state may contain rules of action applying originally, and as a law of local origin, to the relations of private persons within its jurisdiction, who are distinguished by the supreme power as alien, which are not rules that take notice of the effects of the laws of foreign jurisdictions in creating rights and obligations for those persons. Rules of this kind can be called international (as contrasted with internal) only in being founded on the simple distinction between native and alien subjects.<sup>1</sup> The private international law then, so far as it can be distinguished from the municipal (internal) law of any one jurisdiction, is, in its form and manifestation, a rule regulating in that jurisdiction the admission or allowance of different municipal (internal) laws, or of their effects; being properly called *private*, because determining rights and obligations arising out of relations of private persons: whether the municipal (internal) law, first establishing these relations, is principally of a national and public character, or is more strictly private.

§ 70. The three maxims or propositions above given can in their nature be only statements of the self-existent or self-dependent nature of nations, states, or sovereignties, and therefore *laws* in the secondary sense of the word only. If the attempt is made to go beyond these, and state a rule under which this international recognition of municipal (national) laws, (the possibility of which only is implied or stated in the third maxim,) should take effect, or will take effect—a law having the force of a rule of action—a law in the primary sense, it is evident that such rule may be stated either in the form of a rule of which states or nations are the subjects, determining their respective rights and obligations, or, in the form of a rule of which private persons are the subjects. In the first alternative, the rule can only be law in the imperfect sense, or a law of the imperfect kind, and cannot determine the action of such states or nations except

*licht* (realized—actualized—carried out,) under the jurisdiction of a certain law." But Waechter in his treatise (published in the same year, 1841,) on the collision of laws in Archiv. f. d. Civil. Praxis, vol. 24, p. 237, takes the word *verwirklicht*, as employed in a citation from Struve, in a sense which appears to be directly opposite to that above given. The first necessity in questions of this kind is a received nomenclature.

<sup>1</sup> Such as naturalization laws, police laws relating to immigrants.

by being identified with their several autonomic will or consent; and it will be *public* international law, from the character of the persons upon whom it operates, or for whom it is said to be a rule. In the second alternative the rule may have the coercive character of positive law, in reference to the action of private persons, and be a rule which judicial tribunals may apply, or will be bound to apply in determining the rights and obligations of such persons, in relations in respect to other persons and in respect to things; being *private* international law from the character of the persons upon whom it operates, or for whom it is said to be a rule. But it is evident with regard to the possibility of any such rule—a rule having the character of positive law,—that it must be part of some municipal (national) law; that is, it must, according to previous definition, be identified with, or rather must derive its existence from, the ascertained will of some legislator,—some political person vested with the authority of society or of the state.

Now to whatever degree the state or nation, or the possessors of supreme or sovereign power, may, in their political entity or personality, be bound (by public international law—the law of “positive morality”—*Austin, ante* § 11, n.) to allow foreign laws to take effect within their own jurisdiction, their judicial tribunals have the like duty, in allowing or refusing the international admission of foreign laws, which they have in enforcing the municipal law strictly so called—the internal law—the law operating within each national jurisdiction irrespectively of the existence of other such jurisdictions; they must ascertain the will of the supreme power of the state in reference to such international allowance.

§ 71. It will be remembered that the relations which it was supposed might be indeterminable under the legislative power, or the law of a single state were herein before divided or classified by differences in the comparative effect of space and time in connecting their legal existence with the legislative action of more than one state, (*ante* § 65.)

In regard to the first class of relations—that namely in which the persons and things, which are to be the subjects and objects of the rights involved in those relations, are not all supposed to

be at one time under one and the same jurisdiction, (in which case the question, by which legislative power the relation is to be determined, would precede the existence of the relation, and where it would be impossible that the action in which those rights must be manifested should take place without some concurrent legislative action on the part of the respective states within which those persons and things should be found, either producing one common rule or consenting to the controlling operation of rules proceeding from one or from the other,)—the question of the existence and determination of these relations, when raised before a *judicial tribunal*, may appropriately receive the name of a question of *the conflict of laws*; which name has been given by Huber, Story, and others, to cases determined by private international law as herein described.

That name, however, is evidently less appropriate to express the question of the existence and determination of the second class of relations, before described: since, according to the supposition, the persons between whom they are to exist, or the persons and things who are to be the subjects and objects of the right involved in that relation, are always at some one time under the exclusive dominion of some one state.

§ 72. The international determination of the first class of relations constitutes one of those topics of jurisprudence wherein it has been found most difficult for judicial tribunals, or for private jurists and law writers, to agree in *a priori* deductions from elementary and necessary principles.<sup>1</sup> Rules, however, may exist, in regard to this class of relations, in the jurisprudence of any one country, either originating in positive legislation or in judicial precedent, which, of course, must be taken to have been intended for jural rules, or rules founded in natural reason, and not merely arbitrary and accidental determinations. And so far as any rules are found to have been concurrently adopted in the jurisprudence of different nations, they thereby acquire the character of a universal jurisprudence or *law of nations*; and there is in that fact an authority for the judicial tribunals of any

<sup>1</sup> To these rules the citation given by Schæffner, § 22, note, well applies:—"Leyser; Med. ad Pand. Sp. 283, p. 1162. says in regard to Farinacius and others. *Regulas in illis multas inveni, sed quando eas cum subjectis limitationibus contuli, ipsarum regularum nihil superesse vidi.*"



one country or state, (in the silence of the local legislation or customary law on that point,) to adopt them, as being presumptively accordant with the legislative will of the nation or state whose juridical authority they exercise.<sup>1</sup> But it appears to have been difficult, even by such an *a posteriori* or inductive method, to discover any harmonious and consistent system of rules applicable in such cases.<sup>2</sup>

The determination of the second class of relations is simpler, because the relations are first taken to be *in existence* under the legislative action of one state or nation, or one possessor of sovereign power, and the question is of their *continuance* or *realization* under the legislative and juridical power of another.

§ 73. Since *status* or personal condition, as defined in the first chapter, consists principally in the possession of individual rights, and the relations of which it is an incident do not imply the exercise of rights relative to specific things, it must always be at any one time under the legislative power of some one state; that is, the state within whose actual territorial jurisdiction the natural person may be found, whose *status* or personal condition is to be determined. So far, therefore, as it may become a topic of private international law, it appears as an incident of the relations of the second class above described. That is to say, the *status* of a natural person can become a question of private international law, only when such person is supposed to have had a *status* or personal condition in relations created under some foreign law, which relations being regarded as existing or having existed under the foreign law—the question is of their *realization*, *actualization*, or continuance.

Since the inquiries to be pursued in the following pages will be limited to questions connected with the law of *status* or condition, private international law will in this chapter be further considered only as it may determine relations of the second of the two classes above described.

<sup>1</sup> The principle—*locus regit actum*, when applied to this class of cases, may however be cited as an example. And compare Savigny: *Heut. R. R.*, B. 8, c. i, § 348. The eighth volume of this work of Savigny relates exclusively to the conflict of laws.

<sup>2</sup> *Saul vs. His Creditors*, 17, Martin's Rep. Louisiana, 569, by the court: "We know of no matter in jurisprudence so unsettled, or none that should more teach men distrust of their own opinions, and charity for those of others."



§ 74. Although the question before the tribunal determining the *status*, or condition of private persons under international law, regards the maintenance of legal relations of persons, or of correlative rights and duties of persons, in respect to persons and things included under a certain national jurisdiction, those relations, or those rights and obligations, are not, by the very implication of the third maxim, to be regarded as entirely dependent, or not so in the first instance, upon that municipal (internal) law which is the territorial law, or local law, of that jurisdiction in which those persons and things are found. Whenever a question is made of the determination, under private international law, of rights and duties incident to the class of relations now under consideration, a recognition of private persons as aliens, in respect either of birth or of domicil, or at least as having been anteriorly subject to some other jurisdiction, is pre-supposed; and the private international law (i. e., that part of the national law of the jurisdiction which is to determine that question,) is applied as a *personal* law,—a law attaching to certain persons in virtue of their anterior subjection to a foreign jurisdiction, irrespective of the general territorial operation of that municipal (internal) law of the *forum* to which they are, or have been, alien in a greater or less degree, or under a greater or less variety of circumstances, (*ante*, § 53.)

It was stated in the first chapter, that the contrasted relations (conditions) of alien and native subjects are necessary or axiomatic ideas in international law, being stated in those definitions which form the first portion of international law (public and private) according to the division there given. But the fact of mere subjection, independently of place of birth, to different jurisdictions, is that upon which the distinction of an international law—being a rule determining the relations of private persons, and operating as part of the municipal (national) law of some one state, or nation—is founded. It being possible that within the jurisdiction of any particular state persons may be present who have been subject to the territorial jurisdiction of another, the laws of the first may be conceived of as making no distinction between them and others in consequence of that fact. But the laws of a state are not necessarily nor usually

thus equally operative. All within a national jurisdiction are equally subject to the supreme power of the state, but the laws therein (i. e., the national law,) may apply differently to natives, and to those originally coming from another national jurisdiction. This difference in the application of the national law may be combined with the recognition of the rights and obligations of private persons in relations caused by a foreign law to which they have been previously subject; and there may be a difference in the degree of this recognition, and in the extent of the local, or territorial law of the *forum* to persons who are not native, by discriminating between them in respect to their being either permanent and domiciled, or transient and temporary subjects. When the previous actual, or territorial subjection of certain private persons to a foreign law is judicially recognized in the *forum* of jurisdiction, and the question is made of the realization or continuance therein of rights and obligations of those persons in relations existing under that foreign law, then the local or national law operates as private international law. For though this distinction between persons is made under some municipal (national) law—i. e., some law known as the positive law of some one nation, or state—that law, being differently applied to persons thus discriminated, or distinguished,—may be denominated *international*, because it then determines the operation of the municipal (national) laws of different countries, or states. In these cases, the relations of certain persons are recognized simply *as facts* existing by the operation of a foreign law; but the validity of the rights and obligations included in them is determined solely by the local juridical authority. And so far as the tribunals of the *forum* are concerned, the relations existing under the foreign law are to be brought to their judicial cognizance by proof, like other facts: they are not legal effects which the tribunal is bound independently to take notice of.<sup>1</sup>

§ 75. When persons and things pass from one national jurisdiction into another, it is impossible, in the nature of things, that all the relations in which they were the subjects, or objects of rights and duties under the law of their original jurisdiction,

<sup>1</sup> Foelix : Dr. Int. Pr., § 18. Story : Conf. L., § 637, and the cases cited.

should exist under the jurisdiction to which they have been removed; because all the persons and things which were with them the subjects, or objects of corresponding rights, or duties, in those relations, are not transferred with them to the new jurisdiction. It is not, therefore, supposable, when persons thus pass from one jurisdiction into another, that all their rights and obligations, existing under the law of the first jurisdiction, should be maintained by the law of the second. That class of rights of persons, which in the first chapter were called *absolute*, or *individual* rights, may (since they exist in a relation of individual persons to the whole community, without distinction of specific individuals in it, and as rights of action have no determinate, or special objects,) continue to be, for the subjects of them, the same in effect; though the objects may be different, and the supreme power sustaining them is a different political personality. But those rights (the right *to* private property, or *of* private property, for instance,) so far as they are relative to specific persons and things, and those rights which were in the same chapter called *relative*, because arising under relations of persons to other determinate persons, cannot, it is plain, subsist under the law of the new jurisdiction unless the persons and things which are the relative subjects and objects of those rights are transferred to the new jurisdiction. But it is plain that so far as the action implied in any legal relation continues to be physically possible, notwithstanding a change of place on the part of the persons between whom, or the persons and things in respect to whom, or to which that relation has once subsisted, any of the rights of persons arising out of a relation constituted by the law of one jurisdiction, may be allowed to retain the character of a legal right, under the sovereign authority of the new jurisdiction. Whenever this is the case, the supreme national authority, having independent power in a specified territory, adopts the law of another, or allows it to take effect therein as a law of foreign origin; though its authority as *law*, in the strict sense, must always in that jurisdiction depend on the local sovereignty.

§ 76. Since, then, this allowance, or disallowance, depends on the same authority as the municipal (internal) law, it must

be ascertained in the same manner as the municipal (internal) law, resting on that authority, is ascertained. According to the view given in the first chapter of the manner in which the will of the supreme authority in states becomes expressed or assumes the form of law, that will may be ascertained either—1; from the direct expression of the will of the state in positive legislation, (*esto*;) or, 2; from an interpretation of natural reason by tribunals appointed by the state, (*videtur*.) If the sovereign or supreme power has expressed its will by legislative enactment or action having that effect, that expression is equally authoritative and controlling in this case as in the case of relations falling under municipal law strictly so called, (the internal law.) If no such expression exists, the tribunal must make this allowance or disallowance by reverting to the law of natural reason, as it reverts to the same for the presumed legislative will of the sovereign in enforcing the municipal or internal law. And, however autonomic or independent in its estimate of natural reason, as bearing on the relations of nations to each other, or of its own obligations (under that international law, which, as a law binding on states, is a law in the imperfect sense only,) the possessor of supreme legislative power, or the national sovereignty of any state may be when allowing or repudiating the effects of foreign laws, the judicial tribunals of any nation, at the present day, in pronouncing a judgment upon the same point, can refer only, either, as has just been said, to the positive legislation of the sovereign, or to standards of natural reason which have, by anterior judicial recognition and the implied sanction of the sovereign power whose will they execute, acquired the authority of law. These are—judgments of antecedent tribunals under the same national authority in like international cases; customs which have existed under that authority; accepted expositions of law by private persons; and, in cases where these domestic precedents do not furnish a criterion applicable to the case in question, the laws, usages, and judgments of other nations, *in respect to the international* recognition of the laws of foreign states, may be referred to, on the same principle by which such tribunals refer to the municipal (national) laws of other nations for an exposition of natural reason to be applied

as their own local or municipal (internal) law—the principle, namely, that, from the nature of society and of states, the laws of all states are to be taken to intend to conform to natural right, or are promulgated for jural rules, and may be judicially referred to, by the tribunals of any one nation, as an exposition of natural reason to guide in the administration of its own (national) law—whether internal or international law—in cases where the other standards of the will of the state which are more direct, do not give a sufficient rule. The limits of an autonomous judgment on the part of a judicial tribunal being, at the present day, extremely narrow.

§ 77. The propriety of this reference by the courts of any one nation, is, as to such courts in nations wherein laws have long been administered, based upon precedent—the usage of their predecessors.<sup>1</sup> But the principle upon which such reference is made becomes itself, when once established, a rule of particular force in the international recognition of relations which have been created by foreign law; or—to employ a different form of expression—becomes more directly operative as a principle of the international private law. For, since the tribunal, in the case supposed, is necessarily proceeding on the supposition that the state, where it has not declared its will by positive legislation, must still be presumed to will that which is accordant with natural reason, it would follow—from the very nature of the assumption, which is above stated, in favor of the jural character of foreign laws,—that the state will recognise and support foreign laws and their effects upon persons and things coming within its dominion, when those laws are not contrary to the rule of right contained in the municipal (internal) law:<sup>2</sup> for if such a rule exists in that internal or local law, and

<sup>1</sup> Smith's Compend. Merc. Law, p. 6. "Here it should be observed, that the foreign laws and foreign lawyers, who have been just mentioned as having influenced the formation of the mercantile law of this country, were never, at any period, recognized by the judges of our courts as being *per se* of any authority whatever. Respected the rules which they laid down may be, for the learning and sagacity which they evince, but, when they are obeyed, it is part of the law and custom of England, declared to be such, either by long usage and tradition, or by the decisions of our own courts of justice, containing an enlightened adaptation of ancient principle to modern convenience," &c.

<sup>2</sup> Potter *vs.* Brown, 5 East, 530, by Lord Ellenborough. "We always import, together with their persons, the existing relations of foreigners as between themselves,

it is applicable to persons in circumstances of natural condition similar to those in which the persons known as aliens are found, it must control, so far as applicable, all rights and obligations of those aliens, and overrule the relations created by the foreign law,—by the very supposition on which the presumption in favor of a judicial recognition of the effect of the foreign law is based, viz. :—that the state—the legislator of the forum intends to enforce jural rules, or laws which are rules of right—*jus*.

§ 78. It is this principle arising out of the jural nature of society, or of the state, and the method in which law is judicially ascertained, which is the true basis of, and the warrant for that *judicial* recognition of rights and obligations of private persons in relations created by foreign laws,<sup>1</sup> which is commonly referred to the operation of the *comity* or good will of *nations*, and the prospect of reciprocal advantage. That recognition or allowance of the foreign law being then supposed to depend upon a *judicial* estimate of what comity or the prospect of reciprocal advantage requires the nation, for which the tribunal is acting juridically, to allow.

It is evident that if comity or good will, or the prospect of reciprocal advantage is, or ought to be, a motive acting on states and nations—the possessors of sovereign legislative power—and if it does, in an ethical point of view, require states or nations in their political personality to allow foreign laws to operate within their territory, or to recognize relations created by foreign laws, it is still only a part of *public* international law, from the character of the persons upon whom it operates, and a law in the imperfect sense only, or of an imperfect kind only—a part of positive morality, operating on states. And though it may be admitted that it *ought so* to operate upon any particular state, it still will be the duty of judicial tribunals to ascertain the will of the state upon that point, before allowing or giving effect to the foreign law in any case. It is further evident that when the will of such state on this point has been

according to the laws of their respective communities; except, indeed, where these laws clash with the rights of our own subjects here, and one or other of the laws must necessarily give way, in which case our own is entitled to the preference.”

<sup>1</sup> Therefore this judicial recognition of foreign laws, or of their effects, is not derived *a priori*, or founded on an *a priori* juristical theory. See Reddie's *Inq. El. &c.*, p. 230.

ascertained, it is entirely immaterial, in jurisprudence, the science of positive law, to inquire what may have been the motive acting on the state or nation, exercising sovereign legislative and juridical power, which induced it to allow or require this international recognition of foreign laws. The tribunal has simply to consider it as the rule of right established by the state. And it would be, for the tribunal and for private persons, equally law and a jural rule if it should have been caused by selfishness or enmity, and be reciprocally disadvantageous.

§ 79. This doctrine of an international comity being the basis of the *judicial* recognition of foreign laws and their effects appears to have originated in the third of Huber's three maxims, so often cited in works on international law. These are, (Huberi: Præl., Lib. i., Tit. 3. De Confl. L., § 2):—

1. Leges cujusque imperii vim habent, intra terminos ejusdem reipublicæ, omnesque ei subjectos obligant, nec ultra. *Per l. ult. ff. de Jurisdic.*<sup>1</sup>

2. Pro subjectis imperio habendi sunt omnes qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorentur. *Per l. 7, § 10, in fin. de Interd. et Releg.*<sup>2</sup>

3. Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur.

The third of these maxims resembles the third of the three herein before given, in being only the statement of a condition of things—a law in the secondary sense: but it differs in not stating the *possibility* of such international allowance, but the fact that it *is* actually made by the rulers of empires, rectores imperiorum; and it differs, still further, in not only stating the fact, but also the motive or reason which induces the supreme power, the rectores imperiorum, to make that allowance—that is, the motive of *comity*. But it is not here stated that judicial tribunals, which are not rectores imperiorum, may or do, *from comity*, make this admission in any case, until they have ascertained that it is the will of the sovereign power for

<sup>1</sup> This citation is the same as Dig. L. ii., Tit. i., 20.

<sup>2</sup> This citation is the same as Dig. L. xlviii., Tit. 22, 7, § 10, *in finem*.



whom they act judicially—the rector imperii—to make it. When that will has been ascertained, it is immaterial what may have been the motive operating on the supreme power or the sovereign source of the national law. There is, therefore, in this maxim, nothing making comity a judicial rule—or something, the extent and limits of which are to be judged of by the judicial tribunal.

§ 80. It being, however, assumed that the actual legislative and juridical practice of nations is one of the criteria by which the tribunals of any one nation are to ascertain that law of natural reason which they are juridically to apply as the positive law of the state—the fact that different nations, (or the civilized nations of Europe and America,) have severally sanctioned this international allowance, so far as not prejudicial to the *potestas* and *jus* of the state, or of its citizens, may be taken to be an authority for the tribunal<sup>1</sup> to make this international allowance in matters of private law, when not contrary to the *potestas* and *jus* of the state, or of its citizens; quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur. These words are translated by Story: Conf. of L., § 29,—“so far as they do not prejudice the powers or rights of other governments or of their citizens.” The word *juri* here translated “rights of,” &c., might more correctly be translated *law*; or, better—*law and right*: the word *jus* having the sense not only of a *right* but also of a *law*; in the sense of a *rule of right*, a jural law—that which must be judicially recognized as *right*, as well as *law*.<sup>2</sup> But then it is evident that the tribunal has nothing to

<sup>1</sup> 1 Burge Comm., p. 5. “Hence, by that which is sometimes called the *comitas gentium*, but which is at other times and more properly called the common necessity or the mutual advantage of nations, *la nécessité du bien public et général des nations*, it is established as a principle of international jurisprudence that effect should be given to the laws of another state whenever the rights of a litigant before its tribunals are derived from, or are dependent on, those laws, and when such recognition is not prejudicial to its own interests or the rights of its own subjects.”

Judge Bradford, in *Ex parte Dawson*, 3 Bradford's R., 135, having reference to the action of an English *judicial tribunal* and its obligation to recognize the effects of the law of the State of New York in the case, says, citing the above passage: “It may also be safely laid down that from comity and considerations of mutual interest, foreign states recognize and give effect almost universally to those laws of the domicile,” &c., “respect being had in this particular to the sentence of the appropriate tribunal in the place of domicile.”

<sup>2</sup> The meaning of the word *jus*, in Roman jurisprudence, will be particularly examined in a succeeding chapter.



do with the *comity* or any other motive which may be supposed to have acted on those states, or which may or may not, for the future, influence the sovereign, *rector imperii*, whose judicial function it exercises. It is enough for the tribunal that such has been the practice of nations. Another statement of this axiom by Huber, in the treatise, *Jus publicum Universale*, Lib. 3, cap. 8, § 7, is also cited by writers on international law. “*Summas potestates cujusque reipublicæ indulgere sibi mutuo, ut jura legesque aliorum in aliarum territoriis effectum habeant, quatenus sine præjudicio indulgentium fieri potest. Ob reciprocam utilitatem in disciplinam juris gentium abiit, ut civitas alterius civitatis leges apud se valere patiatur.*”<sup>1</sup>

If this maxim of Huber is intended only for a statement of the fact that this is the practice of nations, it is entirely unnecessary to allege comity or reciprocal advantage as the cause. As a principle of private law, it is sufficient to say that the admission has been so generally made that it has become a principle of *universal jurisprudence*, which the tribunals of every nation are bound, in the absence of a particular national rule—statutory or customary—to receive as a rule of natural reason accepted by the state. And this, perhaps, was the meaning of Huber in the passage last cited—in disciplinam juris gentium abiit, ut civitas alterius civitatis leges apud se valere patiatur. It is, however, evident, from the remarks in the *Prælectiones* following the three maxims, that he there conceived that the tribunals were to base their recognition and allowance of the effects of foreign laws upon considerations of comity, reciprocal utility, &c. And in saying in that place that the three maxims, or this topic of jurisprudence, belongs to the *jus gentium*, and not the *jus civile*, he apparently intends, by the former, that international law of which nations, in their political personality, are the subjects.<sup>2</sup>

<sup>1</sup> So in 1 Voet, de Statutis, § 1 ; 12, 17. “*Dein quid ex comitate gens genti . . . liberaliter et officiose indulgeat, permittat, patiatur, ultro citroque.*”

<sup>2</sup> It will be necessary, hereinafter, to show that the term *jus gentium*, in the writings of the civilians, has been used in two significations, the one being the original meaning which it has in the *Corpus Juris Civilis*, equivalent to *universal jurisprudence* the other, a modern meaning equivalent to *public international law*, according to the definitions given in the first chapter. This double meaning has occasioned much misconception and misquotation. See Reddie's *Inq. Elem. &c.*, ch. iv.

§ 81. The later writers following Huber have constantly cited the axiom as implying that judicial tribunals are to regard the comity of nations and considerations of reciprocal advantage as a criterion by which they are to allow or disallow the operation of foreign laws upon persons and things within the jurisdiction of their states; or—to vary the form of statement—that the tribunals are to take into consideration whether out of comity, or by, or for, or under comity, the nation or state is bound to admit the operation of the foreign laws, and then determine the rights and obligations of private persons accordingly.

This idea of a *judicial* recognition of comity of nations, reciprocal advantage, &c.,—the motives which are supposed to act on the supreme authority—the rector imperii, seems to have been seized upon from an inability to discover what authority a judicial tribunal could have in making that practical recognition of the effects of foreign laws which it was plainly seen was nevertheless constantly taking place. In order to justify the courts in thus giving effect, as it seemed, to a foreign law, the courts were made to assume the powers of the state or of the sovereign. They were supposed to have abandoned their judicial function of applying the national law (positive law) to private persons, and to have assumed to act for the state in its political legislative capacity, and to decide what were the dictates and requirements of a rule which, in operating on the state as its subject, is a public law, and a law in the imperfect sense only: while, in fact, neither comity nor any other motive or rule acting on states or nations had anything to do with the *judicial* recognition or non-recognition of the foreign law. The state, in vesting the tribunal with juridical power, and having recognized all other states as expository of that rule of right which was to be enforced in its own jurisdiction as positive law, had already recognized the validity of the effects of foreign laws within its own jurisdiction, if not contrary to the rule of right contained in its own local municipal (internal) law, and this question of contrariety was the only one for the consideration of the tribunal.

The whole of this doctrine of the comity of the nation ap-

plied by the court,<sup>1</sup> involves the fallacy that the tribunal is to determine the rule of right for the action of the state, when the whole of jurisprudence is founded on the principle that the state determines the rule of right for the action of the tribunal.

§ 82. Judge Story, in his Conflict of Laws, § 31, accepts Huber's three maxims for the basis of private international law, but it will be seen that in translating the third maxim he introduces the word *ought* in a manner not strictly justified by the terms of the original; though, by so wording it, the real basis of the action of judicial tribunals is indicated. The maxim as given by Story, Confl. of L., § 29, is: "The rulers of every empire, from comity, admit that the laws of every people in force within its own limits, ought to have the same force every where, so far as they do not prejudice the powers or rights of other governments, or of their citizens." In Huber's statement, it is not said that the *rectores imperii* admit that foreign laws *ought* to have effect, or that it is *right* that they should have effect, &c. It is merely said that, in point of fact, they have allowed them to take effect. But the *practice* thus stated by Huber is, to the tribunal of the forum of jurisdiction, the indication that the national law—or the author of the national law, does consider that foreign laws ought to have that effect; and

<sup>1</sup> 18 Peters R., 589, by Taney, C. J., citing Story's Confl. of L., § 38. "It is not the comity of the court, but the comity of the nation, which is administered and ascertained in the same way, and guided by the same reasoning by which all other principles of municipal law are ascertained and guided." 1 Greenleaf Evid., § 48.

Therefore, the idea of "comity of nations," "international comity," operating as a judicial rule, has been denominated by some authors a fiction of romance. Schæffner, §§ 29, 80, says: "From being jurists they became poets; inventing the fiction, that the comity of the nation was making place for the foreign law: or else—in instances of direct juridical contradiction between the two laws—they played the part of the statesman instead of that of the jurist; pointing out the commercial or other disadvantages which might accrue to the subjects of their own state if the foreign law should be disallowed.

"This romantic idea of the *comitas gentium*, originating in a misconception of the nature of law, and bearing a great resemblance to a *blocus hermétique*, lurks in many of the older treatises, and reappears even at the present day, as, for example, in Story's work. Now, if we observe closely how the principle of the *comitas gentium* has been carried out, we become aware, to our surprise, that it has never, in fact, been actually applied, or at least that in most of the supposed cases, some principle entirely distinct from the *comitas* has been appealed to. How could any consistent result be attained by following a conception so utterly vague and unjuristical. It is not possible, in fact, even approximately, to decide correctly the simplest question of international private law by this principle. Where is the beginning of the end of comity? How can questions of law be answered according to political considerations which are of all others the most fluctuating?" (Transl.)

therefore, it is also to that tribunal its authorization in realizing or maintaining the rights and obligations belonging to the relation created by the foreign law. If the state to which the tribunal belongs had not indicated its approval of this customary action of states or nations, the court or tribunal would have no power, from the practice here stated, to maintain the effects of foreign laws: whatever view it might take of the demands of international comity, and the prospect of reciprocal advantage. This indication is found in the customary law of such state; which, as has been shown in the first chapter, § 36, recognizes other civilized states or nations as the legitimate expositors of natural reason, and requires its tribunals to recognize a universal jurisprudence, a historical *law of nations*, ascertained from the practice of all civilized nations. The motives for that practice are immaterial. It is the customary law of the land, derived from the legislative and juridical practice of nations, having an international effect, which the tribunal applies under this rule; not the considerations of duty or of advantage which may be supposed to operate on states and nations in regulating their conduct by any code of law, so called.

§ 83. M. Fœlix, in his *Droit International Privé*, ch. iii., *Principes Fondamentaux*, note, professes entire concurrence with Judge Story's view of the principle of comity. "La doctrine que nous exposons dans ce chapitre est celle de M. Story; nous l'adoptons complètement." And he expressly vindicates, the doctrine of a comity of nations—international comity applicable by the tribunals; that is, makes the question—what does comity require? a question for courts of law to decide. In § 11, his language is—"Les législateurs, les autorités publiques, les tribunaux et les auteurs, en admettant l'application des lois étrangères, se dirigent non pas d'après un devoir de nécessité, d'après une obligation dont l'exécution peut être exigée, mais uniquement d'après des considérations de utilité et de convenance réciproque entre les nations (*ex comitate gentium, ob reciprocam utilitatem*,") &c.—going on to describe the motives which may and do operate on sovereign states, in allowing a foreign law to operate: but making no distinction between the functions of the judge and the legislator, and as appears in the

citation here given, even putting administrative officers—*les autorités publiques*, and the publicists—*les auteurs*, all in the same juridical position.

In another part of the same section, M. Fœlix speaks of the force of the practice of nations in this respect as a juridical authority ; meaning, apparently, that this practice is the warrant for the admission or application of foreign laws by judicial tribunals.—“Mais ce qu’il y a de certain c’est qu’aujourd’hui toutes les nations ont adopté *en principe*, l’application dans leurs territoires des lois étrangères, sauf toutefois les restrictions exigées par le droit de souveraineté et de l’intérêt de leur propres sujets.” And near the end of the chapter—“L’usage des nations a établi, *pour leur avantage réciproque*, et dans certains cas, l’effet des lois étrangères ;” without, however, stating explicitly whether the tribunal is bound to regulate its decisions by this “usage des nations,” or is to consider comity and “avantage réciproque,” before making the allowance.

§ 84. If it were simply stated that the custom of nations having been *comiter*—that is, either in a way which shows comity and good will, or prompted by comity and the hope of reciprocal advantage, to require their judicial tribunals to maintain the relations created by foreign laws when not contrary to the rule of right established by the local law, or, in the language of Huber—“*quatenus nihil potestati et juri alterius imperantis aut ejusdem civium præjudicetur* ;” or, in the language of M. Fœlix—“sauf toutefois les restrictions exigées par le droit de souveraineté et de l’intérêt de leur propres sujets,”—therefore the tribunals of any one nation are bound to carry out or maintain the relations created by foreign laws, there would be no practical objection to the allegation that the political cause of that admission is the good will of the nation and the prospect of reciprocal benefit ; and there would be very little practical utility in the attempt which has here been made to discriminate the true theory of the *judicial* recognition of foreign laws. The question before the tribunal would, under either view, practically be decided by the same inquiry—that is, whether the relation created by the foreign law is contrary to the rule of right—*potestati et juri* contained in the local law, as

before explained. But it is evident that the effect of basing the historical fact of this customary *judicial* recognition upon comity has been to induce judges to assume the part of diplomats, acting for the state or nation in its integral political personality, and to decide matters of private right (the rights and obligations of private persons) by political considerations. And there is much in the writings of Story, Foelix, and others, to sanction this practice.

This tendency, which is no where more apparent than in the juridical literature of the United States, has in a great degree been caused by the supposed necessity of a judicial protest against another misconception, entertained by some few writers on these questions, who hold that a state may be *bound* (as if by positive law) to admit foreign laws to operate within its territory, if not actually injurious to its political sovereignty. Story, Conf. of L. § 33, observes, "It has been thought by some jurists that the term 'comity' is not sufficiently expressive of the obligation of nations to give effect to foreign laws when they are not prejudicial to their own rights and interests. And it has been suggested that the doctrine rests on a deeper foundation; that it is not so much a matter of comity, or courtesy, as a matter of paramount moral duty," (citing Livermore: Dissertation on the contrariety of laws, p. 26 to p. 30.) But these jurists also make this supposed duty of the state the basis of the action of the tribunal. Now, the duty of the state is evidently beyond the action of its own judicial officers. The admission, to whatever degree it may be sanctioned by the state, may have resulted from motives of comity, or from a sense of duty. But if comity, or any thing else, is conceived of as a necessarily binding measure of the degree in which this *judicial admission* shall take place, then a rule, operating as positive law, is assumed to have determined the juridical action of the state, when, in jurisprudence—the science of what law is, the action of the state is the only possible criterion of the rule. The comity of nations, operating as *law* within any one national jurisdiction, will be only whatever the possessor of supreme legislative power therein allows for comity, or by comity.

Jurists, who, on the other hand, have asserted that absolute



independence of the state in this matter which is a necessary consequence of fundamental principles, have apparently been unable to distinguish between the different positions of *the state* (acting under a law of the imperfect kind) and *the tribunal* (authorized only to apply positive law): not remembering that though the state is not bound to admit the foreign law, yet its tribunals may be bound to admit it or recognize its effects; though they are bound to do so, and can do so, only so far as the state may have indicated its will on the point. Therefore, in proposing to enforce that rule which the state *has sanctioned* as right, the tribunals have conceived themselves as determining also what the state *ought to sanction* as right. Or, to resort to the language of German (Kantian) metaphysics, the law they have applied in these cases has been a *subjective* and not an *objective* conception of the rule of action.<sup>1</sup>

<sup>1</sup> Waechter, on the Collision of the private laws of different States, (Archiv. f. d. Civil. Pr. B. 24, p. 238.) Transl.

"It is agreed on all hands, and our laws unmistakeably declare, that the law derives its validity from itself, from the moment of its being formally promulgated, unconditionally, and without reference to the *subjective* opinion of individual members of the state in respect to its intrinsic merit and accordance with justice; that the requisition of a constitutional form and the limits of a constitutional power alone determine its validity, and not the nature of a law according to *subjective* theories. The judge is simply the instrument of legislative will, declared in a certain formally legal manner, (the common will, to which each individual will in the state must be unconditionally subject) and this law it is the province of the judge to apply, without considering whether it is just or unjust, suitable or unsuitable, conformable or not conformable, in his *subjective* conception, to the nature of a law; and the citizen is equally bound to submit himself to this general will. If, for example, the law of a state expressly determines according to which rule a relation created in a foreign country is to be adjudicated—whether by the local law of the *forum*, or by that of the foreign country, the judge in that state is bound to decide accordingly; even if such adjudication may in itself be called inconvenient, unjust, or contrary to the natural requisitions of a law. \* \* \* \* The possessor of legislative power, in making a statutory determination of the question, will regard it from two several points of view; considering on the one side—the interests of the local juridical system, the exclusion therefrom of discordant elements and the maintenance of injunctions based on high purposes and the requisites of a jural society, and of the dignity and independence of its juridical power;—on the other side—the considerations of international justice which here become operative, and which demand the recognition of the legal capacity of the foreigner as well as that of the citizen, and also, in many instances, make the allowance of foreign laws advisable.—But though these considerations of utility, reasonableness, friendly understanding, natural law and the like may, and in a certain degree ought to influence the legislator, especially in forming international compacts respecting these questions, these are not matters for a judicial officer to take into consideration. He has only to inquire what the juridical will of his sovereign or the positive law of his own state may have determined on these points." And, in a note, "The different positions of the judicial officer and of the legislator are too often confounded, in treating of this topic of jurisprudence."

Savigny, Heut. R. R., B. 3, c. 1, § 848, citing this passage from Waechter, thinks

§ 85. But, irrespectively of the method or principle by which the judicial tribunal will have authority, in any case, to recognize and maintain relations created by foreign laws,—before the maxim as herein before stated, (§ 77,) or as stated by Huber and Story, can be practically applied by a tribunal supposed to have jurisdiction of an alien, that tribunal must be furnished with a test by which to know in what cases the foreign law, if allowed to take effect, would conflict with the *potestas* and *jus*—“the *power* or *rights* of its own government and its citizens.” Or, according to the translation herein before given, (§ 80) of the word *jus* and the *a priori* view taken of the foundation for the international admission of foreign laws, (§ 77,) that tribunal,—admitting the presumption to be in favor of their admission—must still compare the foreign law with the *measure of right* contained in the local law,—its own municipal or internal law. In this connexion the *potestas* and *jus* of a state may be taken to be equivalent to its public and private municipal law, which are necessarily taken in its own courts to be *jural* rules,—rules accordant with natural right or natural reason.

§ 86. Laws which differ in their national source and character, may be called the same or similar laws, when each, within its own jurisdiction, produces similar correlative rights and obligations between persons in similar circumstances of natural condition. Any two such laws, must, in that case, be taken by the tribunals of the respective authors of each to be equally correspondent with natural reason; or, to change the form of expression, rights and obligations so produced by one national law, must be taken, in the jurisdiction of the other national law, to be correspondent with natural reason. And if the persons and things who are the subjects and objects of these rights and obligations pass from the jurisdiction of one law to that of another, the foreign law may be taken, by the tribunals of the latter, to be consistent with the *potestas* and *jus* of the latter—following the terms of Huber’s maxim: and the

is too restrictive of the judicial function: Savigny attributing a greater relative importance to judicial tribunals as a source of law. But compare Foelix: Dr. Internat. Pr., Pref. v. vi. n, on the importance in juristical literature of distinguishing between *a priori* and *a posteriori* doctrines.



foreign law be allowed international recognition and support; having then, in fact, a personal extent in a new forum.<sup>1</sup>

§ 87. Every national law is necessarily taken, by its own author and tribunals, to be rightful in the circumstances and for the persons to whom it is applied. But even if laws of different national origin should, each in its own jurisdiction, create different relations from those which would be created by the other, in the jurisdiction of that other, in reference to similar persons and things, (in which case the two laws could not be said to agree in a judgment of the dictates of natural reason), yet it does not follow of necessity that they are *opposed* in such judgment, or that the tribunals of either jurisdiction should deny a jural character to the laws of the other, operating in the jurisdiction of that other, or that either should refuse to acknowledge any of the effects and consequences of the law of that other, in the relations of persons formerly subject thereto, who might afterwards pass under or be found within its own jurisdiction. For though every principle entering into the municipal (internal) law of a state must be taken by its tribunals to be a jural law, and accordant with natural reason, it is, in the nature of the case, first promulgated as a law for persons and things within its several territorial jurisdiction.<sup>2</sup> But when any distinction of persons as alien or domiciled is made then the question of *the extent* of the principles of the local (internal) law, is to be determined judicially; looking to the intention of the supreme power. For a principle of the local law may be intended to apply to one or more specified persons, or to a class of persons, or to all persons indifferently, within the jurisdiction. It may be intended to affect the relations of those persons only who are domiciled or native subjects, or of those only who are aliens to the jurisdiction, or it may apply to all human beings generally, as the objects and agents of that action in a civil state which the law

<sup>1</sup> See *ante*, §§ 53-56.

<sup>2</sup> "For there are in nature certain fountains of justice whence all civil laws are derived, but as streams; and like as waters do take tinctures and tastes from the soil through which they run, so do civil laws vary according to the regions and governments where they are planted, though they proceed from the same fountain." Bacon *Adv. Learn. B. II. c. 8.* Works, vol. I. 238. Am. Ed.

Montesquieu: *Spirit of Laws*, Book I, c. 8.

Scaccia: *Tractatus de Commer.*, Quæst. VII. par. II. ampl. 19, § 19.

contemplates. The judicial officer, while enforcing the local law as the rule of right, must apply it according to the limitations and with the extent intended by the supreme sovereign will. And in the jurisprudence of every state its own laws may be distinguished-as being jural, either by being merely expedient and suitable to circumstances of position and character peculiar to itself, or jural by enforcing obligations founded on the nature of man and co-extensive with human existence; (though this distinction is the growth of an advanced stage of jurisprudence, as will be shown.) In other words, although the municipal (internal) law of any nation is always to be taken as a rule of right for its own national domain, it does not follow that it has been asserted by its author for a rule of universal obligation, or as the rule which ought to be everywhere applied to persons and things in like circumstances; in such a sense that the tribunals of that nation are bound to consider every rule contrary to natural reason which should produce effects unknown to the local law.

§ 88. When, therefore, we pass beyond that portion of international law which consists in necessary axiomatic principles, recognized in the very existence of states or nations (and which includes the three axiomatic maxims herein before given, § 63, 67,) to that portion which becomes a rule of action and a law in the primary sense for judicial tribunals, in making that international recognition and allowance of foreign laws which is only *supposed* in the third of those maxims, that part which, though dependent for its force as law upon the autonomous and uncontrolled action of single states, and therefore, not a law in the strict sense for the state, is yet a law in the strict sense for the judicial tribunal and for private persons—private international law, included in the *national* law of the forum—the first, or simplest general principle which may be stated for such law, seems to be this:—*That relations of persons and their constituent rights and obligations, existing under the law and jurisdiction of one state are to be judicially admitted to international recognition (that is, be allowed to have legal effect) within the jurisdiction of other states, when they are not inconsistent with those principles which in the jurisdiction of the latter are juridically known as*

*principles of universal personal application and extent, or which the local law applies to all natural persons within its power and territorial jurisdiction.*<sup>1</sup> And this will include the test for the admission of foreign laws, which is implied in Huber's third maxim—the *power* and *law of right*,—*potestas* and *jus*, of the nation; or that given by Story's version of the same as the limits of comity,—“the known policy and interest” of the state in which is supposed to be the forum of jurisdiction. For the power (sovereignty) and jural character of a state lie at the foundation of its whole law, public or private, constituting the objects of its existence as a part of political society, which are considered by it in the minutest application of law, and must be judicially regarded as the policy and interest of every state, which it maintains wherever it acts as a source of law, or which it applies to all persons within its jurisdiction.

This principle so stated may be regarded as law,—in the sense of a rule of action which is applicable by judicial tribunals; though, in the nature of the case, it cannot acquire the force of a rule to which the state is subject, as under a law in the strict and proper sense of the word. And though, under this rule, the foreign law may be said to produce legal effects, the authority which gives it its coercive force over private persons and the legislative will which directs the tribunal to apply it is always that of the nation having supreme power in the forum. Therefore, the law which causes the legal effect to be realized or actualized is not the law of the foreign country, but that of the forum.<sup>2</sup> The law of the foreign country does not operate in the forum, but it is only a fact or circumstance upon which the local juridical power operates; and therefore the foreign law is always to be proved like any other fact.<sup>3</sup>

§ 89. But since there may be recognized exceptions to the extent of every general rule, there may, in any one jurisdiction, be a person or persons whose relations to other persons and to

<sup>1</sup> The rule given by Schæffner, § 22, for the most general one, may be translated,

“Each legal relation is to be adjudicated according to the law of the state wherein it has become existent. (wo es existent geworden ist.) And with this, regard must be paid to those laws whose whole design is to cause a legal relation to be recognized as such only when it accords with those laws.”

<sup>2</sup> See *ante*, § 67, and note.

<sup>3</sup> See *ante*, § 74.

things are, by force of certain local circumstances, regarded by the supreme power as being specially exempt from the operation of rules or principles to which, irrespectively of those local circumstances, a universal personal extent is attributed; and in this case, notwithstanding the actual exception, under the law of the *forum*, (the internal law,) to the universal extent of these rules or principles, they must still, in their otherwise universal extent, be judicially applied to limit the effects of foreign laws in the manner above indicated.

§ 90. But if a relation may thus have a jural existence in a certain national jurisdiction, though contrary to principles having an otherwise universal personal extent, there might, in other countries, be legal relations which, though contrary to the same principles, should be equally accordant with natural reason in and for the local circumstances of such other countries. And when the persons who sustained rights and obligations in those relations have passed into other dominions, in which the universal personal extent of a principle having a contrary effect will prevent their continuance, still the action arising out of those relations may be regarded as having been lawful in their original *forum*—the *forum domicilii*—though in the new *forum*—the *forum of jurisdiction*, they can no longer continue.

§ 91. The effect of laws having this universal extent must be, like that of every other, to create relations and to attribute rights and their correlative duties, (§ 22.) The rights so attributed by these laws must be in either individual (absolute) or relative. But rights ordinarily known as relative are the attributes of particular persons, in specific relations to other particular persons, (§ 40.) A legal capacity for those rights, which is in itself, in some sense, an individual right, may be universally attributed; though, in the nature of the case, the same relative rights cannot be attributed to all. Individual or absolute rights, however, which exist in relations of one individual to all persons in the community in which such individual may be found, may be attributed to all persons constituting that community. The laws, therefore, which, in having universal personal extent, control the international admission of the effects of foreign laws in reference to the *status* of private persons, will

principally be such as attribute some individual right with its correspondent obligations.

§ 92. This international comparison of foreign laws with the local or municipal law and a universally applicable rule of right contained therein, must always be, in its earliest occurrence, an autonomic discrimination on the part of the tribunal. That is, supposing such international question to have arisen for the first time, it would depend upon the unsupported moral sense—the conscientious judgment of the tribunal, (*arbitrium boni viri*,) in the absence of any positive legislation: every such judgment becoming, of course, a precedent and a law for succeeding tribunals, acting under the same national authority; by which, in course of time, an ascertained customary private international law arises, in and for that jurisdiction.

This juridical act of admitting or rejecting the effects of foreign laws, on the ground of their being repugnant or otherwise to principles of the local law, which are applicable to *all* persons in certain circumstances of natural condition, is, strictly speaking, the act of judicial tribunals only. It is, however, in a certain degree, conceivable as being the act of a legislator also. (See *post*, § 102.)

§ 93. But, in whatever way manifested, this juridical action, when it has taken place on the part of various nations, forms one of those criteria by which the tribunals of any one state may determine what principles, or rules, shall be taken to be rightful, or rules accordant with natural reason, and applicable as the presumptive will of the state under whose authority they act; and also to determine the personal extent of those rules: that is, in the absence of positive legislation, or of precedents of local origin, (*ante*, § 33.) And it is to be observed that, in making this discrimination of laws which shall have a personal extent and international recognition in some other jurisdiction than that in which they were first enforced, the practice of other nations in similar cases has a more original and intrinsic force, as an *international* precedent, (or a precedent of private *international* law,) for the tribunals of any one state, than foreign law and jurisprudence has, as an exposition of right in cases falling under the department of *municipal* (inter-

nal) law. Because it is only by supposing the existence of independent jurisdictions, and a judgment of the tribunals of one, in allowing or disallowing the effects of another's laws, that there can be any exemplification of a judgment, by the recognized interpreters of the will of states, deciding what effects produced by the laws of one state are incompatible with the power and law of right—*potestas et jus*—of another, and what principles of the law of particular states are to be taken to have universal personal extent under the jurisdiction of those states, or constant application to all persons in certain circumstances of natural condition.

§ 94. But in the continuous repetition of similar judgments by the tribunals and legislators of different nations through a long period of time, and the mutual reference made by them to such judgments; together with the customarily received comments of private writers of various nations upon the same, based upon the idea that such judgments contain an exposition of natural reason, some principles, from being constantly recognized by many different nations, will acquire, in the jurisprudence of any one nation, the known character of *universal principles*, or principles of a *universal jurisprudence*. For though, taking law in the strict sense of the word, jurisprudence is the science of the law of some one country or nation, (§ 18,) yet, by distinguishing (national) law into municipal (internal) and international, and by the application of the latter to the relations of persons formerly subject to foreign jurisdictions, a portion of the jurisprudence of each country will be identified with the science of a *universal law*, or *law of nations*. This, though dependent on the supreme national power for its continuance, or coercive effect within the jurisdiction of that nation, may yet, by its tribunals, be considered principles presumed to have universal territorial extent and obligation, and to have legal force distinct from those rules or laws which the state may promulgate as originating in its own separate juridical or legislative power: which last, though equally jural,—or equally intended to conform to natural reason,—are promulgated as law for one dominion only, or, rather, for persons as being simply the inhabitants of its own jurisdiction, without reference to the

existence of other similar jurisdictions ; and they have, consequently, a peculiar local or territorial character ; as have also the relations created by those laws.

The legislative (juridical) authority by which any principles, having this universal character in the history of jurisprudence, are recognized by the tribunal as being accordant with natural reason, and allowed to determine the relations of alien persons, is, indeed, that of the state within whose limits such aliens may be found, and that recognition is ultimately dependent on the political possessor of the supreme civil power. But this is not inconsistent with the assertion, that in the progress of jurisprudence among different nations, a portion of the law of each may be said to result from the general promulgation of all nations, the effects of which its judicial tribunals will recognize without reference to their own national sovereign as the source or origin of law, though such effects are still known to depend in each jurisdiction upon the will of the supreme power, and are recognized and accepted with the intention of carrying out that will.<sup>1</sup> Or, making use of the language of the Institutes, it may be said, that the interpretation of law as a rule of right, and one founded in natural reason,—*quod naturalis ratio inter omnes homines constituit*—has been, as matter of history, so uniform in respect to some relations of persons, and has been so frequently and so harmoniously applied as private international law, that it may be known as that law which *inter omnes populos peræque custoditur*:—a *jus gentium*,—a law among nations, or universal law; the effects of which may be

<sup>1</sup> Savigny: *Heut. Rom. R.*, B. i., c. 3, § 22. Tr.: "In the commencement of their intercourse with the neighboring foreign states it became necessary for the Roman tribunals to recognize, together with their own national law, a law applicable to foreigners ; and not merely the law of some one foreign state, but that which was common to a number of such states. By the extension of the Roman dominion, and the greater diversity of their intercourse with foreigners, their field of view in this respect became proportionately enlarged, and in this manner they gradually conceived the more abstract idea of a law common to the Romans together with all nations, or all mankind. It is evident that the Romans, in founding this conception on observation, could not but have seen that their induction was imperfect, because they did not know every nation, and it is certain that they never were careful to ascertain whether their *jus gentium* actually obtained in the laws of all those that they did know. Still it was natural, after recognizing this comparative universality, to go back to its source, and this they found to be, universally, in *naturalis ratio* ; i. e., the consciousness, implanted in the common nature of man, of a moral rule."

See also, *Hist. of Rom. L. in the Middle Age*, by the same author ; Cathcart's Tr.



particularly enumerated, as is done in the Institutes, Lib. I., tit. ii., § 2. *Ex hoc jure gentium omnes pæne contractus introducti sunt, ut emptio, venditio, locatio, conductio, societas, depositum, mutuum et alii innumerabiles.* And in the jurisprudence of every nation the law may be distinguished as being either rules peculiar to itself, *jus civile* or *proprium*, or else rules common to it with the rest of mankind, *jus gentium*; each of which divisions of the law (national law,—*jus civile* in that sense) may be applied as international or as municipal (internal) law: that is, may be applied either to alien or to domiciled subjects. The term “law of nations” has, in modern jurisprudence, been generally taken to mean public international law only: but the original use of the term, in Roman jurisprudence, as will be hereinafter more fully shown, (ch. iv.,) was that of a private law universally recognized.<sup>1</sup>

§ 95. And though these principles of a so called universal jurisprudence have that character from the historical fact that the relations created by them have been found in force among all nations, and therefore must be supposed to be already known effects of the local (internal) law of each single nation,<sup>2</sup> yet they may retain their jural character and be judicially recognized and applied, on the ground of their historical universality, even when none of the domiciled inhabitants of the forum sustain such relations under the municipal (internal) law.

Having once acquired the character of jural rules, in the jurisprudence of each state, by an *a posteriori* or *inductive* method,—i. e. from the fact of their general recognition,—they will thereafter obtain and operate as *a priori* principles,—or principles from which consequences are to be drawn *deductively*, and will be judicially recognized, by the tribunals of any one nation, because having this character.<sup>3</sup>

§ 96. Therefore when persons who sustain legal relations under the legislative or juridical authority of some state of dom-

ch. i., § 1; and in Foelix: Dr. Int. Pr., § 122, a recognition of this feature of the Roman law; contrasting it with a remarkable difference in this respect, in the modern French international jurisprudence.

<sup>1</sup> Compare *ante*, § 84, and notes.

<sup>2</sup> *Quod civile non idem continuo gentium; quod autem gentium idem civile esse debet.* Cicero de Off. III. 17. Gaius, ap. Dig. Lib. I. Tit. i. § 9.

<sup>3</sup> Peckius, de Regulis Juris, 1.



icil, appear as aliens within any other national jurisdiction, those relations, and the rights and obligations in which they consist, will be recognized, allowed, sustained or maintained, by the judicial tribunals within that jurisdiction, when such anterior relations were founded on principles which have this universal character in the history of jurisprudence; without instituting *de novo* a comparison of those relations with the effects of the local (internal) law: and they will be internationally supported as consistent with the *power, law and right*—*potestate et jure*—of the state having jurisdiction; until positively disallowed by the will of the supreme national power, to be ascertained by some known judicial method.<sup>1</sup> In fact when the anterior relations of aliens are thus continued by the recognition of the historical universality of the legal rule from which they arise, that recognition is an application of *international* private law only from the character or position of the persons to whom those relations are ascribed. But there is in this case no *conflict* between the laws of the two *forums* or jurisdictions, nor any occasion to suppose the operation of international comity,—the comity of the nation. For in this case, by the recognition of the universal prevalence of these principles, the relations so sustained may be said to derive their support directly from the municipal (national) law of the *forum*—the same law, in its legislative source and authority, as that which determines the relations of domiciled inhabitants; for being principles of a *universal* jurisprudence they must be supposed to form a part of that law.<sup>2</sup> But

<sup>1</sup> Thus in *Scrimshire vs. Scrimshire*, 2 Hagg. Cons. Rep. p. 421, it is said, "As there is no positive law of this country which prohibits the court from taking notice of the *jus gentium*."

Greenl. Evid. I. § 5. "In like manner the law of nations and the general customs and usages of merchants, as well as the general law and customs of our own country, are recognized without proof by the courts of all civilized nations." (Citing 2 Ld. Raymond, 1542, Heineccius ad Pand. l. 22, tit. 3, sec. 119. 1 Bl. Comm. 75, 76, 85.)—Here the same universal jurisprudence seems intended, though the term "law of nations" is probably conceived of as being public rather than private law.

<sup>2</sup> *Scrimshire vs. Scrimshire*, 2 Hagg. Consistory R. p. 417. "The *jus gentium* is the law of every country; every country takes notice of it, and this court, observing that law in determining upon this case, cannot be said to determine English rights by the law of France, but by the law of England, of which the *jus gentium* is a part."—Here the term *jus gentium*—law of nations, is used in its original signification—that of private law,—a law determining the relations of private persons, which is known by its universal reception. There are many other cases in which the law of nations is said to be part of the law of England, when, by that term, public international law—the rule acting on nations as political persons is intended: Bl. Comm. I. p. 278,

since it is only by the recognition of some persons as aliens, or as having before sustained relations which did not, in the first instance, *exist* under the legislative authority of the country to which they are alien, that such discrimination can be made, it is only, or primarily at least only, in international law that this universal law or jurisprudence can be recognized.<sup>1</sup>

When any principles of universal jurisprudence have been thus recognized and applied, in the international law of any particular jurisdiction, to determine the condition of alien persons, they will also form a part of the municipal (internal) law of the same jurisdiction, if the alien persons, or those formerly subject to the national law of another domicil, acquire a new domicil in that jurisdiction. Being received as an authoritative exposition of natural reason, with the extent of a personal law, (§ 27,) they must be held to be equally authoritative to determine the condition of the same persons in the *forum* to which they are transferred whether they retain or lose their former domicil.

§ 97. But however general that recognition of any rule of action may have been among the various states or nations of the world, it is not a universal law in the sense of being a judicial rule within the jurisdiction of every state independently of its own will or consent. The word *universal* is a term here applied to a rule or principle in respect of its historical prevalence, and not in respect to an intrinsic universal authority; its actual force, before the tribunals of any state, lying only in the judi-

IV. p. 67. *Triquet v. Bath*, 3, Burr. 1480. *Respub. v. Longchamps*, 1, Dall. 111. The admiralty Reports, *passim*; but this latter use is not proper; except in the consideration that public international law always involves, to a certain extent, the relations of private persons.

<sup>1</sup> Thus the law of maritime commerce prevailing in some one country consists in a great degree in the *law of nations*, or universal jurisprudence; because it must, in a great measure, be formed by the judicial application of private international law; or, in other words, because in point of fact, those relations of private persons which are known in maritime commerce, generally involve actions which must take place in some other jurisdiction than that in which the correlative rights and obligations arising out of those relations have been enforced or are to be enforced.

Kames, Princip. of Eq. B. III. c. 8. "Thus in the Kingdom of Scotland, all foreign matters were formerly heard and decided on by the King in council; in later times a special jurisdiction has been vested for that purpose in the court of Sessions, which decides all such causes on general principles of Equity."

Gains: Com. I. § 92, calls the *jus gentium*:—"Leges moresque peregrinorum;" see also Reddie: Hist. View of the Law of marit. Com. p. 82, 118. Waechter, Arch. f. d. Civil. Prax. Bd. 24, p. 245-6. Smith's Dict. Antiq. voc.—Prætor.

cial presumption that such principle is accordant with natural reason, and that the state, therefore, intends to enforce it as law.<sup>1</sup>

If the state, or those who hold the supreme power thereof, have promulgated any principles with a universal personal extent, i. e. an application to all natural persons within its jurisdiction, which are contrary to the principles of the law historically known as universal, or which produce opposite effects, the tribunal is bound to apply those principles of its own local law, as a test of the accordance of foreign laws with natural reason, without regard to the principles of universal jurisprudence—the *law of nations*—thus historically known.<sup>2</sup>

§ 98. It must be carefully noted that, in this inquiry into the principles regulating the admission or the exclusion of the effect of foreign laws, the term *universal* is applied to legal principles in reference to two entirely distinct incidents of their existence. In the one case the qualitative term *universal* is used with reference to the anterior reception of a legal principle among *all nations*, or at least all nations that are considered, by the state under which the tribunal acts, as sufficiently enlightened to be authoritative exponents of natural reason (§ 36). In the other case the same term is employed with reference to the application of a legal principle to *all individuals* within the power or jurisdiction of some one state, nation, or possessor of

<sup>1</sup> The historical *law of nations*, the universal jurisprudence thus manifested in international law, is therefore the natural law, so far as it can be recognized in jurisprudence, (ante § 34–36). The following passage from Long's Discourses, p. 62, is a modification from that before given from Savigny; but it is here inserted as showing the modern apprehension of the *jus gentium*:

“The observation of those rules of law in their own system which were of a general character and not peculiarly Roman, and the comparison of them with like rules of law which obtained in other states, may have led the Romans to a consideration of those universal principles which prevail in the laws of all nations. In matters in dispute between aliens and Romans, they must also have been led to a practical acquaintance with the law of foreign states, and to the reception of such law, when it was recommended by reasons of utility, and when it was not opposed to the positive rules of their own *Jus Civile*. As the Romans were a practical, and not a theoretical, people, it seems that it was in this way, by their intercourse with other people, that they were led to the assumption or the acceptance of the notion of rules of law more general than the strict Roman rules. This was the probable origin of the notion of a *Jus Gentium*, or *Jus Naturale* or natural law, which two terms are perfectly equivalent in the Roman writers. The term *Jus Gentium* has a reference to the mode in which the notion originated, that is, from the intercourse with other states; the *Jus Naturale* is the term more applicable to the induction, when made more complete by further acquaintance with the institutions of other people, and by the development of more universal notions.”

<sup>2</sup> See *ante*, § 77, and § 88.

sovereign national power, from whom the principle derives its coercive force. For while it is evident that no state has of itself any power to establish a new principle in universal jurisprudence—the historical *law of nations*, (i. e., the law whose universality is a historical fact,) which, from having that character, is receivable by the tribunals of any one country as being presumptively accordant with natural reason every where, yet, within its own territory and jurisdiction, it may attribute to any principle the character of a law which is to be applied *universally*,—that is, applied by its own judicial tribunals to *all persons*, within its own jurisdiction, in certain circumstances of natural condition, or as one founded on the nature of individual men forming the constituents of society; whether it be consonant or not with the code of universal law, or *the law of nations*, historically known.

§ 99. Although, therefore, in the course of the international recognition of the effects of foreign laws, and of the general progress of jurisprudence among civilized nations, some relations, rights and obligations of alien persons, or more generally,—of persons before subject to other jurisdictions,—are, from their general prevalence among nations, as proved by history, to be judicially allowed therein, as accordant with natural reason, or as jural relations,—yet that recognition will always be limited by whatever principles in the municipal (internal) law of the forum of jurisdiction, may have a *universal personal* extent, or apply to all persons under that jurisdiction in certain circumstances of natural condition; being promulgated by the supreme source of the local law as principles which ought to apply to all natural persons in such circumstances.

It being here asserted that the judicial recognition and admission of the effects of foreign laws on a presumptive accordance with natural reason, (*ante* § 77,) is always limited by the operation of local laws having universal personal extent, it may be objected, that this reference to a universal jurisprudence—the historical *law of nations*, in the application of private international law, is of no actual force; and that is sufficient to say, that relations existent under foreign laws are always to be judicially maintained, on the principle of comity, (so called,) unless

the local law having universal personal extent produces rights and obligations inconsistent with those relations. But the validity of this reference is found in the fact that the personal extent of laws,—the question whether they are universal or limited, is ordinarily determined, (as is the far greater part of all positive law,) by judicial action; and that this is to be in the mode in which any rule of law is judicially determined: that is, from external indices of natural reason already accepted by the state; of which universal jurisprudence—the *law of nations*, must always be one. And here is shown the genital connection of universal jurisprudence, or the *law of nations*, with that part of the laws of each country which is universally applied,—has universal personal extent, so far as the legislative or juridical power of that country extends. For the actual universal jurisprudence—the historical *law of nations*—grows out of, or is discernible by the discrimination, (under private international law,) of a part of the law of each nation having universal personal extent, and constituting a standard, in its own courts of law, of the accordancy of foreign laws with natural reason.<sup>1</sup>

§ 100. It may also be objected that it is a contradiction in terms to recognize a principle as forming part of the *law of nations*, or as being a principle of *universal* jurisprudence, and at the same time to intimate a possibility of its being contravened by the local law; for if it is not recognized in the local law it is not *universally* received; or is not part of the laws of *all* nations. Strictly speaking, this is true. Yet it is evident that the sovereign legislative power may contravene principles which before were universally received, or which in the history of jurisprudence have before had the character of a *law of nations*. But still these principles will be *judicially* known to have had that character, up to the period of such legislative act; and the tribunal would still recognize them as being, in the absence of legislation, the best exponent of the will of the sovereign power.

<sup>1</sup> It will be shown, however, in subsequent chapters, that there are cases, incident to the settlement of new countries, or the establishment of laws in countries which have not before had a local, territorial, or national law, wherein universal jurisprudence—the *law of nations*, becomes practically operative in a more direct manner; that is, where it is not merely a judicial means of ascertaining what principles of the *local law* have universal personal extent.

and here appears the connexion or identity of the *law of nations*—universal jurisprudence—with the only *natural* law, having the character of a rule of action, which can in the jurisprudence of any one country be distinguished from the rest of the positive law.<sup>1</sup> Ordinarily, the *law of nations* of the period is always incorporated in the customary municipal (national) law of the forum,<sup>2</sup> operating either as internal or as international law; and such is the intimate connection of the two attributions of universality under a *judicial* discrimination of the law (*ante* § 29–36,) that it would be difficult to separate them. The instances will be few, if any there can be, where an opposition will occur of the *law of nations*, judicially cognizable at any particular period, and a local law having universal personal extent by judicial recognition only. Though it is plain that the supreme legislative power of the state may always disallow the rules of this universal jurisprudence by promulgating a contrary rule, having either a limited or a universal personal extent within its own jurisdiction.<sup>3</sup>

§ 101. General or universal jurisprudence—the science of universal law, or the *law of nations*, so far as it exists distinct from the common or unwritten law of any one state or nation, is known by the long continued international comparison of the laws of various states; the ascertained harmony of their legislation, and of the judicial decisions of their tribunals; collected, digested and expounded by private jurists, and, in course of time, forming a distinct repository of legal principles, and, in some sense, a code of law having universal jurisdiction.<sup>4</sup>

<sup>1</sup> Hence the *jus gentium* of the Roman jurists was often described by them as being identical with the unalterable rules of natural justice. Inst. Lib. i. Tit. 2. § 11, and hence with the Roman rhetorical writers it is often identified with *natura, jus naturale*. See Savigny: *Heut. R. R.*, B. i. c. 3, § 22, and compare *ante* § 19, 34; and Austin. *Prov. of Jurisp.* p. 190.

<sup>2</sup> Savigny: *Heut. R. R.*, B. i. c. 3, § 22.

<sup>3</sup> Wheaton, *International law*, § 10, thus cites from Heffter's *Europäischer Völkerrecht*, § 2.

<sup>4</sup> According to Heffter, one of the most recent and distinguished public jurists of Germany,—‘the law of nations, *jus gentium*, in its most ancient and extensive acceptance, as established by the Roman jurisprudence, is a law (*Recht*) founded upon the general usage and tacit consent of nations. This law is applied, not merely to regulate the mutual relations of states, but also of individuals, so far as concerns their respective rights and duties, having every where the same character and the same effect, and the origin and peculiar form of which are not derived from the positive institution of any particular state’ According to this writer the *jus gentium* consists of two distinct branches.



The distinction of the laws of any one state into rules which its tribunals are to extend to its domiciled subjects only, (or rather to persons who have never actually sustained relations under other laws,) and rules which, as having that universal personal extent which has been above described, they are to apply to all natural persons, whether they have or have not sustained relations under other laws, is necessarily connected with the recognition of such a general or universal jurisprudence—the science of a *law of nations* historically known by the application of international law. For the juridical and legislative action of nations or political states, is, as before shown, one of the most authoritative indices of natural reason, and therefore a test to determine what principles, in the local or internal law, may be judicially taken to be the effects of rules which are not only jural in and for that jurisdiction, but rules so far founded on the nature of man, in civil society, that they may be always judicially presumed consonant with the natural conditions of human existence, and therefore of universal personal extent or application; <sup>1</sup> and at the same time the separate judgment of

“ 1. Human rights in general, and those private relations which sovereign states recognize in respect to individuals, not subject to their authority.

“ 2. The direct relations existing between those states themselves.

“ “ In the modern world, this later branch has exclusively received the denomination of law of nations, *Völkerrecht*, *Droit des Gens*, *Jus Gentium*. It may more properly be called external public law, to distinguish it from the internal public law of a particular state. The first part of the ancient *jus gentium* has become confounded with the municipal laws of each particular nation, without, at the same time, losing its original and essential character. This part of the science concerns, exclusively, certain rights of men in general, and those private relations which are considered as being under the protection of nations. It has usually been treated of under the denomination of private international law.’

“ Heffter does not admit the term international law, (*droit international*), lately introduced and generally adopted by the most recent writers; according to him, this term does not sufficiently express the idea of *jus gentium* of the Roman juriconsulta. He considers the law of nations as a law common to all mankind, and which no people can refuse to acknowledge, and the protection of which may be claimed by all states. He places the foundation of the law on the incontestable principle that wherever there is a society, there must be a law obligatory on its members; and he thence deduces the consequence that there must likewise be for the great society of nations an analogous law.” But compare *ante* § 37 and the note.

<sup>1</sup> Savigny, *Vocation for our Age for Legislation and Jurisprudence*, Hayward's transl. p. 110.

“ On this point the well known prize question of 1788 merits consideration; which required a manual in two parts, of which the first was to contain a law of nature abstracted from the code, [*Code of Prussia*,] the second, an abstract of the positive law itself. This notion of the law of nature was very superciliously received, and thereby injustice was done to it; certainly, under this name, that ought to have been set forth which the legislator himself regards as universal, and not of mere positive enactment, in

each nation upon this point cannot, as has been shown, be manifested, except in the application of international law. In the present advanced state of jurisprudence, among civilized nations, when the various effects of international intercourse upon the relations of private persons have been so frequently made the subject of judicial and legislative consideration, the customary laws of commerce and war furnish rules which will be judicially known as authoritative, in ordinary cases, until new legislation intervenes. And it is rarely the case that a tribunal can make an original discrimination of its own municipal (internal) law, as being either universal or particular in its extent or application to private persons, when deciding on the international allowance of the effects of foreign laws.

§ 102. But if it is necessary in any case to decide,—whether any rule or principle of its own municipal (internal) law is to be taken, independently of any exterior authority, or criterion, to be an assertion of a universal principle—one applying to all mankind, or, rather—one to be applied to all persons within the jurisdiction of the state in certain circumstances of natural condition, irrespectively of their national character or previous subjection to other laws,—the tribunal can have no other guide than the rules of ordinary reasoning applied to the mode in which the municipal (internal) law is asserted or promulgated in reference to persons and things within its own territorial

his laws ;— an interesting historical problem ; exactly resembling that of the Roman *jus gentium*."

As will be shown hereafter, the Romans took the *jus gentium*, i. e. law known by its acceptance among all nations, to be the best exposition of the law of nature, regarded as a rule of action, or a *law* in the primary sense of the word. After the establishment of Christianity in Europe, the Christian Church assumed the possession of a criterion of the law of nations, in a Revelation of which it was the instrument and exponent. (Arnoldi Corvini *Jus Canonicum*, p. 2.) It then denied the authority of the natural reason of mankind, however concurrent ; and in a large part of Europe—perhaps the whole of Europe, anterior to the reformation, the canon law took the place of the *jus gentium* of the Romans ; that is, became the written code of universal jurisprudence. In the canon law digests, *natural law* is first asserted as that part of the national law of each country, *quod inter omnes populos peræque custoditur*: it being understood that the exposition of this universal natural law is the organized Christian Church. (T. Bozius, *De Jure Status*. Romæ, 1600.) From this time it would appear that *jus gentium* and law of nations, in the modern writers, were put for a law of which nations are the subjects, which law, as will hereinafter be shown, was, during the Roman Empire, identified with their *jus publicum* and *jus feciale*. Compare Decretals *Prima Pars*. Distinct. I. c. ix. Phillimore on International Law, p. 24, note. Heineccius, 1787. *Jur. Nat. et Gent.* L. I. c. i. § 21. Butler's *Horæ Juridicæ* Essay, Canon Law.



limits. It is probably impossible to state any legal rules controlling that judgment of the tribunal, (*arbitrium boni viri*,) unless equivalent to the following:—

1. If the will of the state, in reference to the action of private persons in certain supposed circumstances, is expressed by direct legislative acts—a form of words,—it may be expressed in words requiring a universal application, or an extent to all natural persons within the jurisdiction of the state.

2. Wherever the local internal law, derived either by positive legislation or by custom—judicial interpretation of natural reason, attributes rights or duties, to the native or domiciled inhabitants of its jurisdiction, as the incidents of a relation existing independently of the *rules of action* which it enforces as positive law; or, to vary the form of expression, where its rules of action are predicated upon the recognition of such a relation as being part of an existing state of things, in which such persons as the constituents of society are found, and as being the effect of law in the secondary sense of the word, (and therefore of *natural law*, in the only sense in which it is, in jurisprudence, distinguishable from positive law, *ante*, §§ 19, 57,) the source of that local law must be judicially presumed to attribute the same rights and duties to all persons within the jurisdiction or forum, who are in the same circumstances of natural condition.

§ 103. But since the supreme national power of the state may always, by special legislation, determine the legal relations of any particular persons within its domain, and legislation, where it exists, is superior to any indication of the will of the state judicially derived from any other source, the private international law of any one country may, in part, consist of rules applying to aliens (or persons anteriorly subject to other jurisdictions) only, thus derived from positive legislation, modifying, wherever they extend, the judicial application either of principles derived from universal jurisprudence—the historical *law of nations*—or of principles of the local law having before had a universal personal extent within that jurisdiction. So that private international law, as well as every other branch of posi-

ive law, may be ascribed either to a natural origin, or to a positive one strictly so called ;—positive legislation.<sup>1</sup>

§ 104. The international law, in determining under judicial application the rights and duties of persons not sovereign, or not holding sovereign power, is thus a part of the private law prevailing within a national jurisdiction—a rule for persons and tribunals under that jurisdiction, coexistent with the private municipal or internal law therein, and distinct from it in its object and purpose, but not in its authority or political source. It being observed that by such a distinction in the object of the law, and by the recognition of persons as alien to the supposed municipal (internal) law, the first part of international law, (according to the division before given, § 48,) is necessarily implied ; which part has the character of law in the secondary sense only, being axiomatic principles connected with the existence of states and nations, among which the three fundamental maxims before given, (§§ 63, 67, 68,) are in fact comprised. Thus the international private law, as well as every other branch of private law, has also the nature of public law, since it determines, to a certain extent, the mutual relations of states, or the holders of sovereign power. Though, so far as it may do this, the rights and duties of states, incident to those relations, are not the effect of *law* in the same sense as are the rights and duties of private persons, growing out of those relations; the international law being, for private persons, a law in the strict sense of the word, by the authority of the author and source of that municipal (national) law, to whose jurisdiction they may be subject ; but, for states or sovereigns, only a law acknowledged by themselves to have moral obligation,—a rule of “positive morality.”<sup>2</sup> It being only by way of analogy that any rules of action can be called a *law* for sovereign nationalities.

§ 105. The settlement, on general principles, of the international prevalence of laws having different national origins, forms that topic of jurisprudence which has been denominated by Huber, Story, and others, “the conflict of laws.”<sup>3</sup> Strictly

<sup>1</sup> Compare *ante*, §§ 29—36.

<sup>2</sup> See *ante*, § 11, and note.

<sup>3</sup> The phrase *collisio legum* (Hertius) is also employed: with the Germans—*Kollision der Gesetze*. This, like the term *comity*, has been called by some of them a

speaking, there are no conflicting *leges* known to any national jurisdiction. Every rule which has the force of law within any one such jurisdiction derives its force from one sovereign will, and conflicts with no other rule having the same force; whatever may have been the process by which it is judicially ascertained or derived, either by following judicial criteria of natural reason, or the expressed will of the political source of law for that jurisdiction. This is a consequence of the first two of the three fundamental maxims before given, or only another mode of stating them.

§ 106. If the supreme power of the state maintains within its own domain any rights or obligations of persons which have not attached to those persons under its own territorial or local law, the law under which those rights and obligations were created has a particular personal extent, or operates as a personal law. The private international law is a personal law so far as it applies only to a certain class of persons, viz. aliens, or persons who sustain relations which have been created by the law of a foreign jurisdiction, (§ 53.) Those relations having been once thus recognized in international law, the rights and obligations arising from them will be continued, in the same territorial jurisdiction, when such aliens become domiciled inhabitants; unless there is some provision of the local (internal) law which specifically forbids their attribution to domiciled subjects. And the law which had at first a personal extent, by being internationally recognized in the case of aliens only, may thus thereafter become a part of the municipal (internal) law having a new territorial extent.

§ 107. It should be noted that the principle upon which this international recognition and continuance is made is not that the law recognized had a personal character, originally, in the territory in which it first existed, and established those rights and obligations which are here supposed to become the subject of

romantic—"abentheurlich"—expression: (Maurenbrecher: Deut. Pr. R., 2. Ausg., § 76, not. 8.) Wachter, admitting that the term is liable to misconstruction, retains it because its significance is now well understood. Archiv. f. Civ. Prax. Bd., 24, p. 237, n.

As to the case of different laws originating under the same national authority and not conflicting in this sense; see Bowyer. Univ. Pub. Law, p. 146—7. Lindley's Thibaut, § 37. Savigny: Heut. R. R., B. III., c. i., §§ 346, 347, 348.

international recognition. All laws determine relations of persons, (*ante*, §§ 21, 22,) but, according to the view here given, the personal character of a law thus internationally supported is a consequence of its international recognition, rather than the cause of it. It is said by writers on the conflict of laws quoted by Story, in *Confl. of Laws*, p. 12, that "personal statutes are held to be of general obligation and force every where;" and these are contrasted with *real* statutes which are said to have no *extra*-territorial force or obligation. By *statutes* in that use of the term are not intended legislative enactments, but any rules of law affecting relations of persons to other persons and to things:<sup>1</sup> and by *personal statutes* are generally intended those rules which have determined the individual rights of private persons and their capacity for relative rights;<sup>2</sup> though the difficulty which has been experienced in stating general rules to distinguish what statutes are real, what personal, and what mixed, is a proof of the insufficiency of the distinction to determine their international admission.<sup>3</sup> It would, perhaps, be equally correct to say, that statutes which are held to be of general obligation and force every where are personal statutes. Their personal character would then be the result of the extent judicially given to them: and the question is—when will a judicial tribunal be bound to admit them to have this personal extent? If the authority for the tribunal, in doing this, is found in the historical fact of their international recognition, then their personal extent is, in fact, derived from the customary law of the forum.<sup>4</sup>

<sup>1</sup> Foelix: *Dr. Internat. Pr.*, § 5. "*Statutum, coutume particulière.*" § 19, "*Main en même temps le terme statut, surtout dans la matière du conflit des lois est employé dans un sens plus étendu, et il est pris comme synonyme du mot loi.*" Merlin: *Repertoire, tit. Autorisation Maritale*. Bowyer: *Univ. Pub. Law*, p. 163. 2 Kent Comm., p. 456-7.

The term appears originally to have been used to designate a law whose territorial extent was limited to some several province or district of a national state or kingdom, and in that contrasted with the common law of the land. Savigny: *Heut. R. R.*, B. III., c. i., § 347. Thus in England the particular customary laws of borough English, and gavelkind (v. 1 Bla. Comm., 74, 75) correspond to *statuts* of the French Provinces.

<sup>2</sup> Story's *Confl. of Laws*, § 51, and generally ch. iv. of that work.

<sup>3</sup> Reddie's *Inq. in Internat. L.*, pp. 425-7. Hertius: *De Collisione Legum*, § 4, speaking of real, personal, and mixed statutes:—"verum in iis definiendis mirum est quam sudant doctores."

<sup>4</sup> Schæffner, § 31. Reddie's *Inq. in Internat. L.* pp. 477-8. Various European writers for and against this view are cited by Wächter in *Archiv. &c.*, Bd. 24, pp. 255-261.

It would indeed seem, from the writings of the civilians, that there was a period in the jurisprudence of Continental Europe when this personal character of a law was regarded as the juridical basis of the international recognition. And it is plain that after laws of a certain class or character,—laws affecting a specific class of relations,—have, in a number of instances, been allowed international recognition on other grounds, the fact of their having been admitted to have a personal extent within foreign jurisdictions becomes an evidence, to the tribunals of any one *forum*, of their jural character; and, by that international recognition, they may have acquired that historical universality, which gives them, before the individual judicial tribunal, a legal existence distinct from the municipal (internal) law—the law having territorial extent in and for the forum of jurisdiction. As a class of laws which have received international recognition, in determining the relations of persons passing from one territorial jurisdiction to another, they may be called *personal laws*, and so distinguished from laws which have had extent only within certain territorial limits.<sup>1</sup>

Most of the cases, also, which are cited by writers on this subject, to show the international recognition of certain laws denominated *personal* laws, have arisen between jurisdictions which, though having distinct local laws, were under one sovereignty or supreme political power: wherein, therefore, the laws of each province would necessarily be regarded as jural by the tribunals of other provinces under the same sovereign: as in the different provinces of France, when different local laws prevailed therein, but all deriving their legal force from a single juridical and legislative authority.<sup>2</sup>

§ 108. The various legal relations which a person may sustain, in respect to persons and things, together constitute his legal condition. Some of the rights arising out of those relations must, in their nature, be local, and can be exercised only

<sup>1</sup> Some states, though correlatively independent, may still be so connected by a customary international law, that laws affecting the condition of their respective inhabitants have a reciprocal recognition in their several tribunals which is not given by those tribunals to laws particularly derived from other states. As, for example, the various dominions constituting modern Germany. Comp. Savigny: *Heut. R. R., B. III., c. i., § 348.* Wächter: *Archiv. f. d. Civil. Pr., Bd. 24, p. 252.*

<sup>2</sup> Pothier: *Contumes d'Orleans, ch. i.* Foelix: *Droit Internat. Pr., p. 24.*

the jurisdiction wherein they were first created, (*ante*, § 75.) at the individual and also the relative rights of a legal person, considered without reference to any specific *things*, may respectively of their political guarantees,) continue the same in different national jurisdictions, and be considered continuing incidents of his personal condition. In a vague use of the words, such rights are often denominated *personal rights*. When the personal condition of a private person is spoken of, or a law is termed a law *of condition*, the term has reference more especially to the possession of such rights. In the Roman law, the rights which might be attributed to private persons were classified as rights belonging to different conditions, known under the name of *caput* or *status*; some rights being recognized independently of local laws, as being founded on a universal jurisprudence or *jus gentium*, and others being limited to the inhabitants of certain localities, being ascribed to the *jus proprium*, or *civile, Romanum*.<sup>1</sup>

§ 109. If, then, by the private international law which obtains in some one national jurisdiction, (either from positive legislation, or by judicial application of natural reason,) some relations of alien persons may be recognized and enforced therein which have existed under the law of a foreign jurisdiction, it will be remembered, according to what was said of the distinction between persons and things in the first chapter, that a legal relation can have that character only by a recognition of legal persons, and their capacity for legal rights. A contract, if internationally recognized as the effect of a foreign law, is necessarily known to the judicial tribunal through a recognition of a capacity to contract in some natural person. The law of the capacity of natural persons for legal relations, as the law of personal condition or *status*, must, therefore, enter into the international recognition of municipal laws supporting contracts. This capacity of persons is also an object of legal recognition in other relations of persons which do not have the character of contracts: some of which relations are recognized in different national jurisdictions as having a foundation in universal jurisprudence—the historical *law of nations*: such as the relations

<sup>1</sup> See *ante*, §§ 15, 19, and §§ 96, 97.

of parent and child, husband and wife, guardian and ward. These relations have a legal existence in all national jurisdictions by force of customary law, having the character of principles of universal jurisprudence: although different systems of municipal (internal) law may differ in their recognition of the inception of those relations, and even differ in their judgment of the combined rights and obligations arising from them.

The law of legal capacity and personality lies, therefore, at the foundation of private international law, as well as at that of the private municipal law, received or existing in any one nation or state; and the relations of persons which, together with distinctions of capacity, constitute freedom or liberty, and slavery or bondage, may be a topic of international private law, applied in any national jurisdiction, as well as of the municipal (internal) private law prevailing therein.<sup>1</sup>

§ 110. It appears, therefore, that when it is attempted to apply the general principles, herein before stated, in questions of the international recognition of those reciprocal rights and obligations which, in relations between private persons, constitute a condition of freedom or its opposite, the first principle which will apply is, that—

When persons appear within any particular national jurisdiction who have, by the law of a previous domicil, held such rights or sustained such obligations, the conditions of such persons, in respect to those rights and obligations, will be recognized, allowed, sustained, or continued by the judicial tribunals of the new forum in which they so appear, (unless legislation intervene,) when the relations constituting that condition are founded on principles which have, in the history of jurisprudence the character of universality, or of being part of a *law of nations*: because, as has been shown, this historical *law of nations*—these principles of a universal jurisprudence—may be judicially received to indicate what relations are consistent with that measure of justice which the state intends to apply: though they are always liable to be disallowed, within the jurisdiction of each state, by its own autonomic legislative and juridical

<sup>1</sup> *Ante*, §§ 25—27, and §§ 53, 54.



action, and so, in that jurisdiction, to lose their antecedent authority, as guides for the judicial action of a tribunal.

This *law of nations* may include principles determining the possession of either individual rights or of relative rights, and may thus operate as a law of *status* or *personal condition*; which, by its general recognition among different nations, would then have a personal extent, both in international and municipal (internal) law.<sup>1</sup>

§ 111. By the same authority from which every principle of this *law of nations* is derived, i. e., the concurrent juridical action of different states in international relations, some principles of this *law of nations*, determining the condition or *status* of private persons, might be exclusively applied to a distinct class, or definite portion, of mankind: and they would then have a peculiarly personal extent and character, whether manifested in international or municipal law: being, in such case, a law not only of personal condition, but a law of, or for, certain persons only: though being also properly attributed to universal jurisprudence—the law of nations—from their actual historical recognition among all nations.<sup>2</sup>

§ 112. A condition, or *status*, which should consist simply in the possession, or non-possession of individual or absolute rights, may easily be supposed to continue the same after a change from one jurisdiction to another. Those elements of condition which arise out of the relations of *family*—of husband and wife, of parent and child, of guardian and ward—may also be the same, in their essential features, after such a change.

The name of *bondage*, or *servitude*, may, as has been stated in the first chapter, be attributed to various conditions of obligation in private persons, even when the rights correlative to such obligation are rights of other private persons only;—not of the state, or some possessor of political power, (*ante*, § 47.) When spoken of as the condition of a *legal person*, the obligations in which it consists may exist in reference to persons and things peculiar to some one place, or jurisdiction; or, it may be

<sup>1</sup> In connection with this section see particularly *ante*, §§ 99, 100.

<sup>2</sup> See *ante*, §§ 53, 58.



said, the relations of which it is an incident may have an essentially local character; being such as could not be upheld, or continued, except in and for some jurisdiction by whose local law they were created. The relation of master and servant, when consisting in the involuntary absolute servitude of one person in respect to all objects of action—correlative to the right of another private person, is one which might continue the same in any jurisdiction. Whenever the servitude is limited, and in reference to specific local personalities things or circumstances, it is a condition which cannot exist in other states, or national jurisdictions, to which the subject of that condition may be transferred. Such a condition of bondage cannot, therefore, become one recognized by *universal jurisprudence*, or a *law of nations*. Absolute servitude of a legal person, in respect to all objects of action, might, however, be so recognized under principles having that historical character. Still more easily may *chattel* slavery be so recognized; it being a condition which in every state may be the same; for a thing—the object of rights, may be such within any territorial jurisdiction.<sup>1</sup>

§ 113. Whatever incidents in the personal condition of an alien should be ascribed to universal jurisprudence, by the tribunals of any one national jurisdiction, would be sustained, as under the *international* private law of the forum, while he should continue therein in alienage, and would become recognized effects of the municipal (*internal*) private law on his acquiring a domicil; taking effect as a personal law, (*ante*, § 54.) In other words, the rule of action, to which those incidents should be ascribed, would have like operation in the *new forum* upon the condition of the person coming from another jurisdiction, whether he should, or should not acquire a domicil in the new forum. While considered an alien, the operation of such rule would be classified under international law; and upon his acquiring a domicil, the same rule would become a recognized part of the municipal (internal) law. In this case, there would be no *conflict* between the laws of different jurisdictions, and no illustration of the so-called rule of *comity*, (*ante*, § 96.)

§ 114. If any incident of the personal condition of the alien

<sup>1</sup> Compare §§ 44—47.

is not founded on, or supported by this universal jurisprudence, or historical *law of nations*, its support in the forum of jurisdiction is then dependent upon the principle of *comity*, or that principle (the reason and nature of which has been before explained, §§ 76–78,) which gives admission to the effects of foreign laws, so far as natural circumstances of condition admit therein of the continuous existence of relations which first arose under the law of the former domicil; and the foreign law, creating those rights and obligations, may receive a personal extent under the authority of the sovereign of the *new forum*—the *forum of jurisdiction*. But the operation either of the *law of nations*—universal jurisprudence—or of the judicial rule of comity, upon the condition of alien persons, may always be contravened by the autonomic legislation of the supreme power. And the legal effect of each is also constantly subject to the limitation of a judicial application of rules, identified with the local law, (the internal law,) having *universal personal* extent. For if the local law attributes any rights, or obligations, *universally* within its jurisdiction,—i. e., to all natural persons, or to all natural persons in certain circumstances of natural condition, the possession of which is inconsistent with the relations formerly sustained by such persons under the law of their previous domicil, then the rights and obligations which, in those relations, constituted conditions of freedom, or its opposites, cannot, according to the general principles before stated, (§§ 77, 88,) be judicially sustained, nor receive a personal and international extent, under the authority of the sovereign of the forum of jurisdiction, either by force of comity—the *judicial* rule—or by being the effects of rules which may antecedently have been actually common among all nations, or have acquired the historical character of a *law of nations*.

§ 115. In determining what principles affecting the condition of persons domiciled under the local law, (or, in other words, what principles of the *internal* law,) are to be taken to have this universal personal extent to all natural persons within the national jurisdiction, the most authoritative indication is in such statutory enactments as may give this extent to the attribution of any right. Next in order are judicial precedents of

antecedent tribunals representing the same political source of law ; though, from the manner in which the extent of any principle is judicially determined, such precedents are hardly distinguishable—separately from the customary recognition of universal jurisprudence, (see *ante*, §§ 99, 100.) In countries wherein jurisprudence has long been developed, the test of this universality of extent will ordinarily be found in one or the other of these sources of law—either the *law of nations*, or positive legislation. But if cases, affecting personal condition, are supposable in which these do not apply, it may be taken to be a legitimate result of the axiomatic principles of jurisprudence, rendered legally authoritative by the practice of legislating states, that wherever (in whatever national, or independent jurisdiction,) the juridical declaration of capacity for legal rights is not made by creating a relative condition of legal superiority for certain natural persons over other natural persons, but is judicially recognized as the statement of a law in the secondary sense of the word *law*, or of a mode of existence, antecedent to all rules of action embraced in the positive law of that jurisdiction, it has therein (in that jurisdiction) the character of a law of universal personal extent, which must be judicially applied as municipal (internal) law, and also as international law. Where, therefore, the local, or municipal law, operating as the internal, or territorial law, upon persons regarded as its native, or domiciled subjects, takes cognizance of them as legal persons, as well as natural persons, attributing to them capacity for legal rights and duties, simply as a part or incident of the attributes of natural persons, the constituents of society, it thereby declares, or recognizes a natural law or principle—a law in the secondary sense—which must be received and applied by its tribunals, or judicial officers, as a universal law in reference to natural persons appearing within its jurisdiction. And, in this case, no law of a foreign jurisdiction regarding a natural person as a *thing*, or *chattel*—the *object* of rights only, without capacity for rights—can be allowed by those tribunals to have international recognition ; unless, by direct act of positive legislation, (statutes, or treaties,) such law of a foreign jurisdiction, formerly binding on the alien, is al-

lowed to take effect as a law personal to him, and exceptional to the local, or territorial law. The alien must be regarded, in all judicial processes, like the native or domiciled inhabitants of the jurisdiction, as being possessed of all the rights which the local law attributes to natural persons who are not aliens, and as owing only those obligations which are derived from some law for *legal persons*, and of such a character that they may be recognized internationally without contravening in other respects the law of natural rights and universal application as judicially known in that jurisdiction.<sup>1</sup>

§116. But personality or capacity for legal rights might be recognized in all natural persons by the laws of one national jurisdiction, though relations might also be established, under those laws, which would give to one person a control over another, such as is inconsistent with the legal possession of personal liberty by the latter; and these rights of control and correlative obligations of subjection might be internationally recognized in other national jurisdictions, as the incidents of a relation between *legal* persons. Thus the loss of personal liberty under the criminal law of another state might be internationally supported, while the personality of the individual whose freedom is compromised or denied is not disallowed. Or the relations of parent and child, guardian and ward, master and servant,—where the servitude of the latter is involuntary, though not of the *chattel* character,—might be internationally allowed in a jurisdiction wherein, on the grounds above stated, *chattel slavery* could be disallowed or ignored, under a judicial application of the private international law. But it is impossible to conceive of a legal attribution of personality without at the same time attributing some definite or specific legal rights, individual or relative (*ante* §§ 45, 46.) Whenever *legal* obligations are attributed to a natural person, the law, which creates those obligations, must enable him by a legal capacity for choice and action, to fulfil those obligations,—recognizing such action to be according to a legal faculty or power of action,—and consequently recognizing a certain possession of legal rights. It would otherwise enable others to act in reference to him simply

<sup>1</sup> See *ante*, § 102.

as an *object*; and so make him a chattel or thing, to which not even legal *obligations* can be attributed. Legal personality must consist in and by rights, (§§ 43, 44.) The municipal (local or internal) law must make this recognition of personality by the attribution of some rights; though it is not necessary, and is, indeed, naturally impossible, that all persons should sustain similar relations. Some rights, however, may be attributed to persons which are not incidents of relations of specific persons to other specific persons, or which may be equally attributed to any number of persons; while others must be taken to be incidents of relations caused by laws having, necessarily, limited personal extent, (§§ 55–57.) Where by the local or internal law all domiciled inhabitants are recognized as legal persons, irrespectively of the possession of *relative* rights, ordinarily so called, (§ 40,) and that recognition of legal personality is made, not simply as the attribution of a naked right to life, protected by public criminal law, vindicating the welfare of the state, (§ 45,) but by attributing definite *individual* or absolute rights, protected by the private law of remedy,—there the local law, attributing those rights, must be looked upon as the recognition of, or statement of, a law in the secondary sense,—a natural law; and those rights be taken to be the incidents of a state of things existing independently of rules of action established by the state. Being of this character it may be judicially taken to be a law of universal personal extent; that is, one applying to all persons within the power or recognized territorial jurisdiction of that law, and those rights may be attributed to all, as being natural or primordial rights,—that is, rights incident to the condition of persons in the simple primordial relation of individual members of civil society. Where the right of personal liberty is thus attributed by the municipal (internal) law to each individual domiciled within the limits of a state or national jurisdiction, it must be taken to be attributed to those natural persons under a law intended, by its political source, to be a law of universal personal application; which is to be judicially taken to apply to all persons within the territorial jurisdiction of that law, irrespectively of their domicil or their previous subjection to other laws or jurisdictions; and this attribution of that right

will be made whenever the condition of a person is to be determined under the private international law of that jurisdiction.<sup>1</sup>

§ 117. But where the local (internal) law itself supports relations, between its domiciled inhabitants, in which some persons do not enjoy the rights of personal liberty, or are placed in a condition of obligation, correlative to the rights of others, which may be called a condition or *status* of slavery or bondage,—there the local law does not attribute the right of personal freedom, nor any other right,—inconsistent with such condition of bondage,—universally, or to all natural persons. And, according to principles before stated, the slave or bond condition of an alien, caused by, or existing under the law of his former domicil, will receive judicial support, or become realized, actualized, or carried out under the “comity of nations” or the judicial rule which is known under that name: being then a legal effect ascribed to the private international law of the forum of juris-

<sup>1</sup> Though there may be a great want of harmony among the writers who, distinguishing between *real*, *personal* and *mixed* statutes, have attempted to give general rules for their international recognition, they have unquestionably agreed, to a very great extent, in saying that the *status*, condition or capacity for rights of a natural person is every where judicially determinable according to the law of his domicil. See Story: Conf. L. ch. iv. and the older authorities there cited. Savigny: Heut. R. R. B. III. c. i. § 362. Foelix: Dr. Int. Pr. § 29.

This principle has been so often judicially applied that, subject to certain exceptions, more or less generally admitted, it may be regarded as a rule of the customary international private law of civilized states, having the character of a rule of *universal jurisprudence*. (See *ante* § 93.) But no one exception to this rule is more harmoniously recognized by the authorities than this,—that the condition of involuntary servitude established by the law of the domicil, will not be recognized in another independent territory wherein such a condition is unknown to the local law. See Story: Conf. L. § 96. Savigny: B. III. c. i. § 349; and § 365, A. 7. Wächter: Archiv. Bd. 25, p. 172. Schæffner: § 34. Foelix: Dr. Int. Pr. § 31, note. Phillimore: Internat. L. p. 335.

These authors, however, do not now explain how the tribunal is to know that the law which it has to determine and administer forbids, in this case, the operation of the general rule. They either state the exception as one founded on the customary international law of all states, or of a certain number of states, or of some one state, (making it a rule of some one national law,) or else they assume that the tribunal will derive it by a *subjective* conception of the will of the legislator or juridical sovereign. In other words, they assume that the tribunal must declare the existence of such a condition contrary to jural rules. In the first alternative it is evident that the customary international law, either of all states, or of a number of states, or of some one state, on this point, may be different at different times; in the other, that it is the moral judgment of these writers themselves which makes the rule, and that it is an *a priori* assumption on their parts.

And there is another deficiency in this reference to the law of the domicil; for since the domicil of a person is determined, in a great degree, by his own act of choice, (see Savigny: Heut. R. R., B. III. c. i. § 360, ¶ 2,) the question of domicil may depend upon the *status*; for since a slave cannot, as such, elect a domicil, the question of his domicil may involve a prior determination of his *status*.



diction, that is, to a rule identified in its coercive authority with the rest of the municipal (national) law.<sup>1</sup>

§ 118. But though a condition of slavery or bondage may exist under the local (internal) law of the *forum* of jurisdiction, it may therein be considered accordant with natural reason in respect to certain specific local circumstances; being the effect of a law applying to a portion of the domiciled inhabitants in reference to the existence of those circumstances only, and having a peculiarly local or national character. And, notwithstanding the existence of this slavery or bondage, there may be, in the municipal (national) law of the same jurisdiction, a general or universal attribution of personal liberty and other rights inconsistent with the condition of the alien under the law of the foreign state, to all natural persons who are not in those peculiar circumstances of local character by which, or in reference to which, the slavery existing under the internal law is legalized, i. e. declared jural—consistent with natural reason. In this case the slavery of the alien could not be judicially supported on the ground of *comity*—the rule so called; because still contrary to principles having (with this recognized exception under the *internal* law) universal extent within that jurisdiction; even though the local slavery should constitute a *status*—a condition of rights and obligations—very similar in its social consequences to that existing under the foreign law.

§ 119. But though the bond condition of an alien should not be maintained and continued under the law of the forum of jurisdiction, because contrary to a universal attribution of personal freedom under the local law, it does not follow that that condition would not, under the juridical power of *the same forum*, be recognized to have been lawful in the place of his domicil—the foreign country. If, indeed, it is not a necessary consequence of fundamental principles, yet it has always been held, in the customary jurisprudence of every country, that the jural character or rightfulness of every effect of foreign law shall be admitted at least so far as that effect is confined to the national jurisdiction of that law; whatever may be the juridical opinion of other sources of law respecting such effect as the

<sup>1</sup> Compare *ante* § 68, note.

basis of rights and obligations to be enforced within their own jurisdictions. In other words, the relations or actions created or allowed by a foreign law are customarily recognized to have been rightful, in and for its own domain; even when rights and obligations incident to those relations or actions are not maintained or continued in the *forum of jurisdiction*. Therefore, although the right of an alien master in respect to his slave, sanctioned by, or existing under the foreign law—the law of their domicil—should be disallowed in the jurisdiction to which they are alien, yet, under a judicial application of natural reason, (that is, irrespectively of positive legislation,) it will be held to have been jural or rightful, as well as legal, in the foreign country—the domicil of such master and slave: or it will, at least, not be held to have been a violation of rights which in the *forum of jurisdiction* may be attributed to the slave, nor the subject of legal remedy in that forum.

§ 120. By the same reasoning it would appear that even where, under the *law of the forum*, the right of the alien master created by the law of their domicil would not continue, or be maintained as against the slave, yet rights and obligations existing under the latter law as between the master and third parties, in respect to the slave, would still be recognized and maintained. The validity of the master's right in and for the place of his foreign domicil being admitted, would lead to a judicial recognition of the obligations of third parties correlative to that right. The right of civil recompense for violation of his right as master, in the place of his domicil, might, therefore, be maintained against third parties in a jurisdiction wherein the relation itself, as between the master and slave, could not continue. So, too, contracts founded upon the ownership of slaves in foreign states would be judicially recognized, and the rights and obligations growing out of them be judicially maintained in jurisdictions wherein, under the private international law, the condition of slavery as between the alien owner and his chattel slave, or bondsman, could not continue.<sup>1</sup>

<sup>1</sup> But in some systems of municipal (national) law a character of immorality is ascribed to certain actions which prevents them from becoming, under the jurisdiction of those systems, the basis of legal rights and obligations; even though they may have created such rights and obligations in and for the foreign jurisdiction where such action took place. Compare *Robinson v. Bland*, 2 Burr., 1084.



§ 121. The operation of law upon the relations of private persons is a consequence of their being actually within the territorial dominion of the sovereign state or nation from whom that law proceeds. But, as has been stated, (§ 54,) those circumstances which, in international jurisprudence, are technically called *domicil*, determine in many cases whether the condition of a person shall be controlled directly by the law of the jurisdiction (the *internal* law) in which he is found, or, indirectly, by that of some other to which he may have formerly been subject. In many instances, the intention of the person to acquire a new domicil will be held to vary the legal nature of his relations both in respect to persons and in respect to things. Servants, or slaves, either with or without their masters or owners, may appear in a foreign jurisdiction, (a jurisdiction other than that of their domicil,) either as aliens seeking a new domicil therein, or as temporary inhabitants, still continuing, in view of the law *of the forum*, to have their former domicil. But, in a judicial application of natural reason to the condition of either of these classes of aliens, the principles which have been herein before stated are equally of force. Whenever by the operation of these principles, or by positive legislation, the slavery of an alien person is continued after a change of domicil, it becomes a result of the municipal (internal) law of the jurisdiction of which he becomes a domiciled subject. In the other case,—that is, when *the domicil* is not changed, it is, from the continuing alien character of the person, a result of the private international law of the same forum.

§ 122. It is always to be remembered that the international recognition of personal condition which has been considered in this chapter is only a *judicial* act, determined by general principles of jurisprudence, and that it is always subject both to the customary law on the subject (anterior judicial practice) which may have prevailed in the forum of jurisdiction, and also to the positive legislation of the sovereign of the forum, giving an original rule extending, or limiting, the entire judicial discretion of its tribunals.<sup>1</sup> The action of the state, or nation, being, as compared with the action of its tribunals, autonomic, or in-

<sup>1</sup> Schaeffner: § 81. Savigny: *Hent. R. R.*, B. III, c. i., § 361 A.

dependent of law, in admitting or rejecting a foreign law upon the ground of comity, or in receiving or repudiating a principle before ascribed to the *law of nations*—universal jurisprudence.

NOTE.—In connection with the province of the judicial officer in this respect, a principle cannot be forgotten by American tribunals which is no where so fully illustrated as in the jurisprudence which they apply; but in stating which, in an elementary essay, it may be well to cite an authority of foreign origin. Waechter, in a note to the passage herein before cited, (§ 84, n.) after the words—"that the requisition of a constitutional form and the limits of constitutional power alone determine its validity"—i. e., validity of the statute—observes: (Tr.) "The determination of this must, unquestionably, appertain to the judge. That is to say—in our constitutional states—he is bound, in dispensing the law, to follow the legislative dispositions of the government only when they conform to the requisitions of the constitutional law. It is true that he is merely the servant and instrument of the law, (*Rechtsgesetzes*), but, certainly, he is the servant of a *valid* law (*Gesetzes*) only. It is, therefore, both his province and his duty, before applying a rule which claims to be a law, or an exercise of the legislative function, to examine, according to the existing constitutional law, whether it *actually is a law*,—that is, whether it has those qualities which, according to the constitution, must belong to a valid law. If these are wanting, it is his duty not to regard the decree as a valid law. It is true that this has of late been denied by, &c., [citing a German writer.] But this opposite view would make the judge, in his function, the subject of the executive power, [that is, in a state where the executive and legislative functions are not clearly separated,] and destroy both his constitutional independence and the right of the citizen, which is, to owe a *constitutional* obedience, only, to the executive power," &c., &c. [Giving the German authorities.]

## CHAPTER III.

### OF THE ESTABLISHMENT OF MUNICIPAL (NATIONAL) LAW IN THE ENGLISH COLONIES OF NORTH AMERICA. PERSONAL EXTENT OF THE COMMON LAW OF ENGLAND.

§ 123. It has been shown in the first chapter in what sense it may be said, that the extent of territory over which any possessor of sovereignty shall exercise dominion is determined by public international law (§ 51). When changes take place in the geographical limits of the domain so held by the possessors of sovereign powers, the same law, or more strictly, perhaps, those principles of *the law of nations*,—universal jurisprudence,—which enter equally into municipal and international public law, and are sometimes denominated the natural or necessary law of nations, may be regarded as determining the municipal (national) law which shall thereafter prevail in the territory thus transferred or acquired; at least until the new sovereign has exercised empire in establishing or promulgating law by positive enactments. Where such territory has been previously occupied by a nationality having a political organization, with sovereignty manifested in the promulgation of laws, it is a principle of the *law of nations* entering into international and municipal law, which, if not also a natural or necessary principle, has always been received in the customary jurisprudence of civilized states, that the laws formerly prevailing with territorial extent therein remain in force, and act as before upon all private persons within that territorial jurisdiction until changed

by the new sovereign ;<sup>1</sup> with the necessary exception of the previously existing public law or law of political constitution, which is implied in the supposed fact of a change of dominion, and also with an exception which is based upon the jural character of states promulgating law as the rule of right, viz: that former laws become abrogated, by the act of acquisition, which are contrary in effect to rules which, by the tribunals of the new sovereign, are taken to have a universal extent; or which, it may be said, are taken to have moral force in human relations, as natural principles, independently of the will of the state; or which, in the language of Blackstone in a passage hereinafter cited, are taken to be part of "the law of God," as interpreted by the new possessor of sovereignty,—and so held to be universally applicable.<sup>2</sup> Where the territory acquired has been previously unoccupied by any such power its future laws, that is, the laws which shall therein prevail as the territorial law, must originate in the authority of the sovereign acquiring it.

§ 124. It is a principle of the *law of nations*, contained in

<sup>1</sup> Bowyer : Univ. Pub. Law, p. 158. Sir Wm. Jones : Inst. of Hindu Law, Art. 208. "In the part regarding the duty of the royal and military caste or Kchatriyas, it is laid down, that after a king has conquered a country, he ought to maintain the laws of the conquered nation as they have been promulgated." \* \* "The preservation of the Hindu law after the Mohammedan conquest is a remarkable fact, as the Mohammedan law has no provision resembling the laws of Manou mentioned above, but on the contrary does not tolerate the laws of a conquered nation."

Clark's Colonial Law, p. 4. Campbell v. Hall, Cowp. 209. Duponceau on Jurisdiction, p. 65. 1 Kent's Comm. (7th Ed.) p. 178, note.

<sup>2</sup> 2 Peere Williams, 75, (1722,) it was said by the Master of the Rolls to have been determined by the lords of the Privy Council, upon an appeal from the foreign plantation. \* \* \* "3d. Until such laws be given by the conquering prince, the laws and customs of the conquered country shall hold place, unless when these are contrary to our religion or enact any thing that is malum in se, or are silent; for in all such cases the law of the conquering country shall prevail." To this extent only is the exception to the general rule true which is made in Calvin's case (17 Coke, R. 7)—"if a Christian country is conquered the laws remain, but if it be infidel, the laws of the infidel are ipso facto abrogated," etc. In Blankard v. Galdy (1694), as reported in Salkeld, 411, the court "held that in the case of an infidel country their laws do not entirely cease but only such as are against the law of God." It would be difficult to find an illustration of such exception in the whole history of British conquest and colonization. For when lands occupied by savage tribes have been acquired, the country has been taken to have had no territorial law. In Campbell v. Hall, Cowp. 209, Lord Mansfield (1774) said: "The laws of a conquered country continue in force until they are altered by the conqueror; the absurd exception as to Pagans, mentioned in Calvin's case, shows the universality and antiquity of the maxim. For that distinction could not exist before the Christian era, and in all probability arose from the mad enthusiasm of the Croisades."

Whether laws allowing torture have been abrogated by British dominion, see Stokes on the Colonies, p. 11, Mostyn v. Fabrigas, Cowper's R. 169; Sir Thomas Picton's case, 30 Howell's St. Trials. Report of the Madras Torture Commission.

the first and second of the three maxims, stated in the previous chapter, which enter into the foundation of international and municipal law, that, so far as laws are territorial in their extent, persons passing from one territory to another change at the same time the municipal (national) law to which they are subject. But laws also have a distinct personal extent when sustained, as applying to certain persons, by some sovereign power having jurisdiction over them. This personal quality of laws is manifested in colonization; where the laws which prevail in the territory colonized depend upon the extension given by the sovereign of the colonist to the laws binding on him in his original domicil. In order that the personality of laws may be thus manifested in colonization, or that laws may thus accompany colonists beyond the limits of their former domicil, it is evident that the sovereign national power, from which that law proceeds, must also be sovereign over the territory to which the person is transferred. Herein the maintenance of personal laws in colonization is part of the municipal (internal) law of some one state, and differs from that recognition of the law of a foreign domain, as a law personal to an alien immigrant, which may be made in *international* law. And here it is evident that the exposition of laws in their personal and territorial extent implies a knowledge of such terms as sovereignty, domain, native subject, alien subject, &c., which are explained by those axioms or definitions which make the *necessary law of nations*, and are presupposed in international and municipal law.<sup>1</sup>

§ 125. From the earliest instances of the political annexation of foreign territories to the dominion of the British crown, there has been much dispute in English jurisprudence respecting the personal extent of the laws of England in reference to such territories.<sup>2</sup> The occupation of countries in the Western Continent

<sup>1</sup> Ante §§ 48, 49.

<sup>2</sup> A. D. 1607—Calvin's case, (case of the Post-nati in Scotland,) 7 Co. R. 17; Le case de Tanistrv (under Brehon law of Ireland) Davis's R. 28; 1666—Vaughan R. pp. 290, 402, (relating to Ireland and Wales); 1684—Wytham v. Dutton, 8 Mod. 160; reversed in 1694—Dutton v. Howell &c., Shower's Parl. cases, 24; 1694—Blankard v. Galdy, 4 Mod. R. 215, and Salk. 411; 1705—Smith v. Brown & Cooper, Salk. 666, Holt R. 495. Smith v. Gould, Salk. 667, and 2 Lord Raym. 1274; 1769—Rex v. Vaughan, 4 Burr. 2500; 1774—Mostyn v. Fabrigas, 1 Cowp. 161 and Campbell v. Hall, 1 Cowp. 204; 1802—Collett v. Keith, 2 East, 260; 1817—Atty. Gen. v. Stew-

before unoccupied by civilized societies, presented an unprecedented question of jurisdiction. The leading authorities on this point are thus summed up by Blackstone (Comm. Introd. p. 107) in a passage often cited:<sup>1</sup> "Plantations or colonies in distant countries are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated and peopling them from the mother country, or where, when already cultivated, they have been gained by conquest or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies with respect to the laws by which they are bound. For it hath been held, (2 Salk. 411, 666,) that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, (2 P. Wms. 75,) are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such for instance as the general rules of inheritance and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue, the mode of maintenance for an established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore they are not in force. What shall be admitted and what rejected, at what times and under what restrictions, must in case of dispute be decided in the first instance by their own provincial judicature, subject to the revision and control of the king in council: the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the

art, 2 Mer. 159; 1824—*Forbes v. Cochrane*, 2 Barn. & Cress. 463; 1836—*Beaumont v. Barret*, 1 Moore's cases before P. C. 75.

Similar questions must have arisen within England itself upon the Norman conquest, and before that event, upon the union of the Anglo-Saxon monarchies under Egbert, A. D. 827. The local customs of England, such as gavel-kind, were nothing else than the remaining common law of certain districts formerly constituting independent sovereignties.

<sup>1</sup> See *Atty. Gen. v. Stewart*, 2 Merivale, 159. Story Comm. § 151.

legislature in the mother country. But in conquered or ceded countries that have already laws of their own, the king may indeed alter and change the laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the laws of God, as in the case of an infidel country, (7 Rep. 17. Calvin's case. Dutton v. Howell, Shower's Parl. cases, 31.) Our American plantations are principally of this latter sort, being obtained in the last century, either by right of conquest and driving out the natives (with what natural justice I shall not at present inquire) or by treaties. And therefore the common law of England, as such, has no allowance or authority there; they being no part of the mother country, but distinct, though dependent, dominions. They are subject, however, to the control of the parliament, though (like Ireland, Man and the rest) not bound by any Acts of parliament unless particularly named."

§ 126. The theory generally maintained by the crown lawyers, anteriorly to the American Revolution, seems to have been, that the common law, in being the law of the rights of Englishmen, was so, only so far as it was the territorial law of Great Britain; that it determined the rights of British subjects only while in England, and that when in any colony, or other particular district forming part of the Empire, their rights would be determined entirely by a law having a like territorial extent in and for that colony or district: a law which could originate solely in the will of the king, or of the king and parliament, legislating for that colony or district, as a several territorial domain.<sup>1</sup> This theory, and the inferences which those advocates of the royal prerogative who admitted Blackstone's alternatives, based upon his assumption that the American colonies were "principally of the latter sort," were not only constantly controverted by the colonists themselves, but by many English publicists of the time.<sup>2</sup> And it must now be taken as a

<sup>1</sup> Chitty on Prerogatives, c. iii. Chalmers's Hist. of Revolt of Am. Col. vol. i. p. 802. 1 Salk. 666. American Tracts, vol. i.; Dummer's Defence of the N. E. Charters, p. 49,—“And to complete the oppression, when they upon their trial claimed the privileges of Englishmen, they were scoffingly told, these things would not follow them to the ends of the earth: unnatural insult, &c.”

<sup>2</sup> Reeves's Hist. of Law of Shipping, p. 138. 1 Chalmers's Opinions, pp. 23, 195, 220. 2. Chalm. Op., p. 202, 209, 240. Dr. Richard Price's Observations on Civil Lib. &c., pub. 1766.



settled axiom of American law, that the territory of the colonies was claimed by right of occupancy, or by finding it "desert and uncultivated;" and that the common law of England first obtained in that part of the Empire as a law personal to the English-born colonist.<sup>1</sup>

Besides the effect of this principle, all the charters, with the single exception of that of Pennsylvania,<sup>2</sup> declared that the colonists and their children should have all the rights of subjects born in England.<sup>3</sup>

§ 127. But, it being supposed that the common law of England was thus transplanted with the British colonist to America, and was there operative in determining his rights as a private person, another question, or one which was the same question—regarded as a matter of public law—arose,—upon what political authority would the continuance of that law, as the territorial law of that colony, thereafter depend?

According to the views of the English lawyers, at the time of the settlement of the colonies, the patent gave a title to the soil, but prerogatives of government could only be exercised under a charter from the crown.<sup>4</sup> With the exception of the first charter of Virginia, of 1606,<sup>5</sup> the royal charters, in constituting the colonial governments, provided that the local legislation should not be contrary to the laws of England, or that it should be conformable as near as might be to the laws of England; and besides this, the charters, as before noticed, guaranteed to the English colonists and their descendants the rights of subjects born in England.<sup>6</sup>

<sup>1</sup> Story's Comm. §§ 152–7, and the numerous authorities cited there; and for the modern English doctrine, Chitty on Prerogatives, p. 80. Chitty's Commer. Law, vol. i p. 639. *Rex v. Brampton*, 18 East's R. 288.

Mr. Jefferson, however, always derided this principle of the personal extent of the common law. See Jefferson's Correspondence, vol. iv., p. 178. Jefferson, being of the *a priori* or "law of nature" school, could be at no loss for a basis upon which to rest such rules of action as he might approve of.

<sup>2</sup> Story's Comm. § 123.

<sup>3</sup> See *post*, ch. vi. Story's Comm. B. I. ch. 16, 17.

<sup>4</sup> 1 Banc. 821. 1 Hild. 175.

<sup>5</sup> 1 Hen. Stat. 57. 1 Banc. 122, 186. The code of regulations made by the king, however, required that the local ordinances should conform to the laws of England, and should not touch life or limb. Story's Comm. § 44.

<sup>6</sup> In reference to the first charter of Virginia, 1606, Bancroft says, vol. i. 121: "To the emigrants it was promised that they and their children should continue to be Englishmen—a concession which secured them rights on returning to England, but offered no barrier against colonial injustice." In this view the guarantee of the rights pos-



There were some very material differences in the political constitution of these colonial governments in being respectively either chartered, proprietary, or provincial.<sup>1</sup> This difference in the investiture of political rights naturally occasioned, in the earlier period of their settlement, important differences between the colonies in respect to the recognition of private liberties, or the foundation of the rights of private individuals under public law.

§ 128. The New England colonial governments were, however, also based on an extraordinary foundation, having, within their several jurisdictions at least, a recognized political existence and validity, in the voluntary compact of those in each who agreed in constituting themselves the original "freemen," and in their individual acknowledgment of the power of the whole body of freemen<sup>2</sup> to legislate as a political state by the voice of the majority.

The first settlers of Plymouth colony in Massachusetts entered into a compact for government before the landing, by which they combined themselves together into a civil state or body politic, mutually promising "all due submission and obedience" to "such just and equal laws and ordinances, acts, constitutions and officers from time to time as shall be thought most meet and convenient for the general good of the colony;"<sup>3</sup> and under this voluntary association they afterwards gradually assumed, without any charter from the crown, all powers of government for local purposes.<sup>4</sup> The governments of Rhode Island,

possessed by every Englishman in England by the law of the land did not operate as a law in the colony. But this is not the view of the effect of such a guarantee which has been taken by most writers on this subject. It is generally considered to have had the same effect as the provision afterwards inserted in the charters, that the local legislation should not be contrary to the laws of England. The local government, under the second Virginia charter and the extraordinary grant of power to the council of the company in England, therein contained (sections 18, 28), seemed to have attributed no effect to the guarantee of rights in the individual colonists. "A code of martial law was at one period the law of Virginia. Servitude for a limited period was the common penalty annexed to trifling offences." 1 Banc. 151, 152.

<sup>1</sup> 1 Bla. Comm., p. 108. Chitty : Commer. Law, i. p. 643. Chitty on Prerogatives, p. 30. Curtis's Hist. of the Constitution, i. pp. 4, 5.

<sup>2</sup> The freemen being, however, only a limited number of the inhabitants, and their *acknowledgment*, even if morally and politically justifiable, being in some sort a usurpation, that is, having no original foundation in public law.

<sup>3</sup> 1 Chalmers's Annals, p. 102. 1 Banc. 309.

<sup>4</sup> Story's Comm. §§ 55, 56. 1 Banc. pp. 320-323. 2 Hutch. Hist., App. i.

Hartford and New Haven, were first formed under voluntary compacts.<sup>1</sup>

The authorities of the colony of Massachusetts Bay, though claiming to act under the charter of government of 1628 to the freemen and associates or corporators of the Company organized in England, which contained provisions guaranteeing common law rights to the colonists and limiting the legislative power of that Company, acted from the outset under a view of their independence of the imperial authority, which differed essentially from the political doctrines entertained in the more southern colonies, whose constitution had been more definitely settled at their foundation. In Massachusetts, the original emigrants and their immediate successors regarded themselves as founding a state on principles of natural ethics and revealed religion, independently of any positive law derived from a pre-existing political authority.<sup>2</sup> In this original charter there was no provision securing to the actual colonists, as inhabitants who might or might not be connected with the corporate body in England, any share in the local government;<sup>3</sup> and the elective franchise, or the capacity of being a freeman of the colony, even after the transfer of the corporate government from England to America in 1629, was made by the grantees of the charter, or the so called "freemen" and associates of the Company, to depend on church membership.<sup>4</sup> Their civil polity being in a great degree identified with their ecclesiastical constitutions, the scriptures of the Old and New Testaments were for a time regarded as part of their civil law as well as the highest rule of moral duty.<sup>5</sup> The

<sup>1</sup> 1 Banc. 892, 402. 1 Chalmers's Annals, 269. 1 Trumbull's Hist., 27. 1 Pitkin's Hist., 42-47.

<sup>2</sup> Reeves's Hist. Law of Shipping, p. 138. Story's Comm., § 67. 1 Banc. 432. 1 Hutch. Hist. p. 251, 2d ed. It will be remembered that the political institution of all the other New England colonies was, in a certain degree, derived from or based upon the pre-existence of the Massachusetts colony. See *post*, ch. VI.

<sup>3</sup> 1 Hild. 180. Story's Comm. § 63.

<sup>4</sup> Ancient Charters &c., p. 117. 1 Hutch. Hist. p. 26, 83., Note. 1 Holmes's Annals, 261. 1 Banc. 860. "The servant, the bondman, might be a member of the church and therefore a freeman of the Company." This is very unlikely; it was probably assumed that the elector should also be a person *sui juris*; women and minors, if members of churches, were not therefore electors.

<sup>5</sup> 1 Mass. Records, p. 174. 2 Hutchinson's Hist. p. 8. "From 1640 to 1660 they approached very near to an independent commonwealth, and during this period completed a system of laws and government, the plan of which they had before laid and

restriction on the local government by the law of England was from time to time acknowledged by the authorities. As in the declaration of the General Court in 1661, entitled—"Concerning our Liberties;" Art. 6, "The Governor, Deputy Governor, Assistants and Representatives or Deputies have full power, &c. ecclesiastical and civil, without appeal; except laws repugnant to the laws of England."<sup>1</sup> But, until the remodelling of the colonial government of Massachusetts under the charter of William and Mary, 1691, constituting a provincial government superseding the two governments of Plymouth colony and Massachusetts Bay, the General Court, constituted either of the "freemen" in person, or their elected representatives, in exerting powers which were contested as derogatory to the supremacy of the king and parliament, or contrary to the public law of the Empire, sometimes exerted them in a manner derogatory of common law rights in their fellow-subjects—rights existing under the guaranteed private law of the colony.<sup>2</sup> For a long period after their first settlement the New England colonies seem to have

begun to execute. In this they departed from their charter, and instead of making the laws of England the groundwork of their code they preferred the laws of Moses."

<sup>1</sup> 1 Hutch. Hist. app. xix.

<sup>2</sup> 1 Hutch. Hist. p. 82, 94, and 2 do. p. 12. Protest of Maverick and Child in 1646. 1 Hutch. Hist. p. 145. Answer of Council for the N. E. colonies to the Privy Council on Morton's petition, 1634. 1 Hutch. Hist. 251, 2d. ed. 230, 3d. ed.; his view of the Massachusetts theory of government. 2 Chalmers's Opinions, p. 31. 1 Hild. 183, 193, 218, 247, 253, 255, 270, 279, 318.

Case of the Brownes (1629), see Chalmers's Political Ann. p. 146. Young's Chronicles of Mass. p. 287, note. 1 Grahame's Hist. p. 217.

In Connecticut revised laws of 1821, Title 94, *Societies*.—"An act relating to religious societies and congregations," a note is appended, giving an interesting summary of the legislation of the colony and State bearing on this topic. It is there remarked: "The object of our ancestors in emigrating to the country, was to enjoy their religion, not only free from persecution, but without interruption from Christians of different sentiments. They were desirous of maintaining a uniformity of doctrine and of worship. The true principles of religious liberty were not then known in any Christian country, and toleration was not the virtue of the age. Accordingly, on their arrival they formed an ecclesiastical constitution," &c. &c. The point to be noticed here is not that they had wrong ideas about the rights of conscience and religious worship, (which may or may not be true,) but that they usurped a prerogative of sovereignty over their fellow-subjects. It may be admitted that the enforcement of the true creed and form of worship is the duty of the state, and that the creed and form of worship adopted by the colonists was the true one. Still the question is—had they the legal right, by public law, to exclude from their limits or otherwise punish those of their fellow-subjects who, in England, might have equally differed from them and yet have been unmolested by the law of the land?

For other recent defences of the New England governments, see North Am. Quart. Rev., Oct. 1851, Oct. 1853, and among the annual addresses before the New England Society in N. Y. the discourse of J. P. Hall, Esq., Dec. 22, 1847.

acknowledged no basis for the liberties of the individual inhabitant beyond the will of the local power. And, whether they were, severally, at particular periods oligarchical,<sup>1</sup> or pure democracies, the government representing the will of the majority of the electors claimed to be the possessor of a sovereign power in matters of private law.

§ 129. From time to time declarations were made by the different colonial governments, with greater or less solemnity, in form nearly approaching Magna Charta and the English bills of rights, in which "the law of the land" was referred as the safeguard of the rights and liberties of the free inhabitants. But these appear to have been put forth, like their great originals at the time of their promulgation, rather as guarantees against violations of the laws of the land by arbitrary executive power, than as appeals to common law and those charters and bills of rights as of constant effect against the supremacy of the legislature.<sup>2</sup> They were probably meant for protests against the arbitrary action of the imperial government, whether legislative or executive, rather than pledges against the abuse of that power which was deemed to be vested in the local government. In some instances where the common law of England was recognized by the colonial authority as the foundation of the rights of private persons, the power of sovereignty to alter that law was at the same time implied to be resident in the provincial government; as by the declaration in the Plymouth laws, published 1636, in the first article—"we the associates of the colony of New Plymouth, coming hither as freeborn subjects of the kingdom of England, endowed with all and singular the privileges belonging to such, &c."—and in the fourth article—"that no person in this government shall suffer or be indamaged in respect to life, limb, liberty, good name or estate, under color of law or countenance of authority, but by virtue of some express law of the General Court of this colony, or the good and equitable laws of our nation, suitable for us in matters which are of a civil nature, (as by

<sup>1</sup> Comp. Washburn's Judicial Hist. of Mass. Ch. 1. Lechford's Plain Dealing, written about 1640 (see Mass. Hist. Coll. 8d series, vol. iii.) 1 Hutch. Hist. p. 94, note. 1 Banc. 431-435. 3 Banc. 15-19. 1 Hild. 233.

<sup>2</sup> Compare Report of the House of Delegates, Virginia, 1799, on the Alien and Sedition laws, Randolph's Ed. p. 220.

the court here hath been accustomed,) wherein we have no particular law of our own," &c. And very similar in effect to this was the act of the legislature of South Carolina in 1712, recognizing the binding force of the common law, as modified by certain specified statutes in amendment of it, "but only when not inconsistent with the particular constitutions, customs and laws of this province."<sup>1</sup>

§ 180. A power in the common law, operating as a personal law to limit the extent of colonial legislation in matters of private law was, however, in the colonies themselves, constantly asserted by those who believed their native rights infringed under colonial laws, whether the body promulgating those laws existed on the democratic basis, or as the organ of a provincial prætor, or of an individual proprietor. In Massachusetts the aristocratic and theocratic parties were compelled to abandon their view of the foundation of their civil state by the intervention of the royal power and the influx of immigrants entertaining different opinions in matters of religion or of ecclesiastical polity.<sup>2</sup> And in all the colonies the equality of all free subjects of the empire, in respect to the rights of civil citizenship under the local government, became established. Even in the provinces acquired by conquest, the personal extent of the common law was constantly claimed by the English inhabitants.<sup>3</sup> The Duke of York's patent or charter of the provinces acquired from Holland, empowered him and his assigns to govern the inhabitants by such ordinances as he and his assigns should establish; but the assembly of East Jersey in 1680, told the governor that it was not on the king's letters patent to the Duke of York, but

<sup>1</sup> 2 Hild. 275, and see *post*, Ch. vi. Laws of S. C. Knickerbocker's Hist. of New York, B. iv. c. 9. "In fact the Merrylanders and their cousins, the Virginians, were represented to William Kieft as offsets from the same original stock as his bitter enemies the Yankees, or Yankee tribes of the East: having both come over to this country for the liberty of conscience, or in other words, to live as they pleased: the Yankees taking to praying and money-making and converting Quakers; and the Southerners to horse-racing and cock-fighting and breeding negroes."

<sup>2</sup> See the King's letter of June 28, 1662, in Mass. Records, Vol. iv., part 2, pp. 164, 167, and resolutions of the General Court modifying the requisites for the elective franchise, in the same, pp. 117, 562; also in Charters, &c., p. 117, and charter of 1691, in the same, p. 28. Story's Comm. § 71. 1 Banc. 431-435.

<sup>3</sup> In 2 Canadian Freeholder, pp. 168, 172, it is argued that New York was not considered by the king as a conquered country, but as a part of the more ancient colony of New England. And see 1 Smith's Hist., N. Y., App., c. 6.

on "the great charter of England" that they relied as "the only rule, privilege and joint safety of every freeborn Englishman."<sup>1</sup>

The colonists claimed that the common law, thus having a personal extent, fixed their social and civil rights as much as those of British subjects in England, and that this was a protection against both the colonial and the imperial legislative power when acting *separately*; in short, that their rights known as common law rights, or the rights of the free subject of British birth, could not be divested except by a national law—*national* because applying to the British subject in England as well as in the colony, and that in the making of such law their several will was entitled to be represented, as an element of the national will, in virtue of the common law regarded as the public law of the empire, or the law of political constitution.<sup>2</sup>

During the colonial period in the eighteenth century, the extent of the common law of England in determining the rights of the British-born colonists and their descendants, in America, became generally recognized in matters of private law. The question of its operation in the public law of the empire, or in determining the public rights of the colonists, continued to be the subject of controversy between them and the parent country, terminated only by the revolution. For it was by resting on the common law, as the public law of the nation, that the colonists claimed to be governed by laws in the making of which

<sup>1</sup> Learning & Spicer's Col. pp. 681, 682. <sup>2</sup> Hild. p. 60.

<sup>3</sup> An Historical Discourse of the Uniformity of the Government of England, by Nathaniel Bacon, of Grais' Inne, (1647) p. 55. "The next and most considerable degree of all the people is that of the Free men, anciently called *Frilingi*, or free born, or such as are borne free from all yoke of power, and from all Law of compulsion other than what is made by his voluntary consent; for all freemen have votes in the making and executing of the generall Laws of the Kingdome," &c.

N. Y. Evening Express, Dec. 23, 1843. Hon. Rufus Choate's Oration before the New England Society in New York: speaking of the residence of certain English Puritans in Geneva, Switzerland, 1553–1558, and its influence upon them,—“There, was a state without a king or nobles: there, was a church without a bishop: (tremendous applause,) there, was a people governed by laws of their own making and by rulers of their own choosing.” If the Pilgrim fathers found in Geneva the model of their infant state, it would be a curious subject of inquiry, whether Geneva was at that time an oligarchic or a democratic republic, according to the modern definitions (see London Cycl. soc. Geneva). But in whatever the Massachusetts colonists may have found their beau-ideal, the civil liberty of the nation which calls itself the People of the United States is in a great degree attributable to the fact that *their* state was not “without a king;” and if religious liberty has successfully been maintained in the States that with just pride venerate them as the founders, it might better be said—it was not because there was no bishop, but because bishops were so many.

they had themselves shared by their representatives ; and, because unrepresented in parliament, they denied its power to legislate for them in local matters.<sup>1</sup>

§ 131. But the power of sovereignty to alter all private law must have existed somewhere, so far as such a power can exist ; and, as to the colonies, it was to be found, according to either the tory or the liberal theory—in the parliament of England, the king and the colonial legislature ; according to the nature of the subject, either severally, or all united. The limits between these co-existing sources of law were never systematically defined, and naturally received a variety of construction. But, whatever may have been the true legal limits of the power of parliament in reference to the colonies, since their international and commercial policy still continued, of necessity, to be connected with that of England, the statutes of parliament affecting such relations must have been indisputably operative during the colonial period.<sup>2</sup>

The legislative declarations of the colonial governments, in the nature of bills of rights, even if not intended only as bulwarks against arbitrary executive power, seem to be founded on the theory that a parliament, or the constituted legislature, is the depositary of the sum of sovereign power, and the source and ultimate arbiter of all law ;<sup>3</sup> and this, whether the colonial legislature was considered as formed by royal charter, or by the voluntary consent of the freemen of the colony.<sup>4</sup>

It has sometimes been asserted by English jurists that the power of the British parliament is controlled, to some degree, by common law ; which control might be exercised by the judges, in declaring its acts void ; and that under the term *common law*

<sup>1</sup> 1 Banc. 442. Duponceau on Jurisdiction, Pref. ix. Declaration of the Congress of the nine Colonies, 1765 :—Story's Comm., § 190. 1 Pitkin's Hist. 285, 286, 340, 344.

<sup>2</sup> Smith's Wealth of Nations, B. iv. c. 7. 1 Chalmers's Opinions, p. 201. Chitty on Prerogative, c. iii. Stokes : Const. of the British Col. Declaration of Rights of the Continental Congress, 1774, Resol. 4. Story's Comm. § 194, note. Virginia Report of 1799, (alien and sedition laws,) Randolph's Ed. 1850, p. 212. Curtis's Hist. of the Constitution, I., p. 20, 21, and generally on these points, Story's Comm. B. i., c. 16, 17.

<sup>3</sup> This is the doctrine of 1 Chalmers's Opinions, p. 1.

<sup>4</sup> Unless in Connecticut and Rhode Island, during the early periods of their political existence, the body of the electors or "freemen," may be taken to have been the actual government and possessor of political power. Compare Bancroft's Hist. vol. I., for the political history of these colonies.



natural right or reason is included, as a rule of distinct existence, capable of being separately recognized by the tribunal. Thus Sir Henry Finch, in a *Treatise on the law of England*, pp. 74–76, declares, that positive statutes contrary to common law, reason and nature are void; and in *Bonham's case*, 8 Coke, 118, it is said, "and it appears in our books, that in many cases common law doth control acts of parliament; for when an act is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such acts to be void;" citing some of the older cases, wherein common law rules of the most constant application have been used to limit the apparent effect of Acts of parliament. And by Hobart, C. J. it is said that "an act of Parliament made against natural equity, as to make a man judge in his own cause, is void in itself, for *jura naturæ sunt immutabilia*, and they are *leges legum*." (*Day v. Savage*, Hobart's R. 87.) Holt, C. J. in *The city of London v. Wood*, 12 Modern R. 688, says that parliament can do no wrong; though it may do several things that look pretty odd; that it may discharge a man from his allegiance, but cannot make one that lives under a government both judge and party; that it cannot make adultery lawful, though it may annul the marriage of *A* with *B* and make her the wife of *C*." But Coke, in 4 *Institutes*, 36, says of the power of parliament, that "it is transcendent and absolute, and that it cannot be confined, either for causes or persons, within any bounds." And Blackstone, in 1 *Comm.* p. 161, says that "it can do every thing that is not naturally impossible," that "it hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime or criminal; this being the place where that absolute despotic power, which in all governments must reside somewhere, is intrusted by the constitution of these kingdoms."<sup>1</sup>

With regard to laws impossible to be executed they must be of necessity, legally as well as naturally, void, since no judicial

<sup>1</sup> And compare Bacon's *Abridg. Statutes*, A. Dwarries on *Statutes*, pp. 642–647. The passages in Bracton, Fleta and the *Mirror* which speak of the law of nature as immutable by the legislative power of the state, are only repetitions of the language of Justinian's *Institutes*, and must receive the same exposition. See the next chapter.



or executive power can give them an effect contrary to their own nature. Blackstone says, Comm. vol. 1, p. 91: "Acts of parliament that are impossible to be performed are of no validity; and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions; though I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know no power in the ordinary forms of the constitution that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule do none of them prove, that where the main object of a statute is unreasonable, the judges are at liberty to reject it: for that were to set the judicial power above that of the legislative, which would be subversive of all government." Mr. Christian's note to this passage concludes as follows:—"but where the signification of a statute is manifest, no authority less than that of parliament can restrain its operation." The conclusion of Sir Matthew Hale respecting the power of parliament is equal to a definition of the supreme legislative and judicial power of every state or nation:—"this being the highest and greatest court over which none other can have jurisdiction, if by any means a misgovernment should any way fall upon it, the subjects of this kingdom are left without all manner of remedy."<sup>1</sup> From these various authorities it may be inferred to be the theory of the public municipal (national) law of the British Empire,<sup>2</sup> that the entire sovereignty of the nation is vested, or as may be said, has *primordial* existence (by right above law), in the legislating body or bodies—king, lords or commons, or the three united; including under this designation all colonial or local legislative bodies. All that sovereign power

<sup>1</sup> The statute Confirmatio Chartarum, 25 Edw. 1. c. 1. declares that the great charter shall be held for common law; and the statute of Westminster, 42 Edw. 3, c. 1: "It is asserted and accorded that the great charter and the charter of the forest be holden and kept in all points, and if any statute be made to the contrary, that shall be holden for none." See Co. Lit. Proeme to 2d. Inst. An Act of parliament is thus the authority for the restriction of parliament by common law.

<sup>2</sup> The question of the limitation of the legislative function of the English government, under the British constitution, is a question of public municipal (national) law,

in any nation may do, this organized body or incorporated government may do.

§ 132. But whatever may have been the extent of the power residing in the British parliament alone, or in it together with the provincial governments, to determine the laws which should prevail territorially in the American colonies, the common law of England was always regarded in each of the colonies, for many years anterior to the revolution, as a law of national as well as local extent, determining the rights of the colonists of English birth and their descendants, as fully as those of native-born subjects of the same race residing in England: and no permanent alteration of common law liberties, as to them, occurred during the period of the union with the mother country.<sup>1</sup>

§ 133. As has been remarked in the first chapter (§ 42), the term liberty, when used to express an actual condition of privilege enjoyed by a person living in political or civil society, can only be described as the effect of laws resting on the sovereign power of some state or separate political society,—*positive law*, in the comprehensive sense in which it had been herein before used: while, in the conception of that effect, as constituting a condition either of liberty or its opposite, not only the purpose and object of the law must be considered, but also its character as a relation between superior and inferior, or in other words, its source, authority and extent.

Regarding *law* only as the expressed will of a sovereign, or of a possessor of that sovereign and supreme authority which must in every state have intrinsically the same nature, and *liberty* only as the result of law,—every condition of privilege, or degree of liberty which may in different states be attributed to private persons may be said to have the same foundation. Where a distinction is observed in the nature of municipal law, as

which ought to be distinguished from the politico-ethical question, noted in the first chapter, respecting the authority of a law of nature; being distinct questions: the one of law, positive law,—the other of ethics or political science.

<sup>1</sup> American Tracts, London, 1766, Dummer's Defence of the New England charters, p. 49. And compare the cases cited in note to § 126. The paper by Bentham, 1808, entitled, "A plea for the constitution," and relating to the illegality of certain local laws in New South Wales, will be found interesting in connection with the subject of this chapter. So also Lang's Freedom and Independence for the Golden Lands of Australia, London, 1852.

being either public or private, the freedom of action which is enjoyed by private persons in a state or political society may be called the result of private law. But since there must be in all states a public law, or law of political constitution, by which the source, duration and extent of the private law is determined,<sup>1</sup> the effect of that public law is always an essential element of the liberty enjoyed by private persons in the ordinary relations of civil society, those which are ordinarily considered distinct from the public or political relations of the state.

§ 134. Whatever condition of a natural person, who is a member of a civil state, may be called liberty, must be juridically known as composed of individual and relative rights; since it consists in relations existing under law: and those rights may be called liberties—though with constant reference to the existence of law. In all states wherein a public law, or law of political constitution (in any proper sense of the word *law*), can be said to exist, a distinction may be made between that liberty of the individual members of political society which exists in civil or social relations, (which may be termed liberty by private law,) and liberty of action in connection with the public and political life of the state, (liberty by public law.) The first might also be properly distinguished as social or civil liberty; the second, political liberty.<sup>2</sup> But since, wherever the last can be said to exist, the first, or liberty by private law, acquires a distinctive part of its nature in the guarantees afforded to it by the public law,—in such states the definition of the term civil liberty includes the basis of private rights in the public law; since the nature and existence of private law is itself the topic of a *law* in the strict sense of the word.

§ 135. When in English and American jurisprudence civil liberty, in general, or any particular right or liberty is spoken of as the result of the law of England, and attributed to any private persons subject to the sovereignty of the British empire, the political foundation of the law by which the rights of private persons are defined is always indirectly referred to, and the

<sup>1</sup> Bacon, De Aug. Scien. L. 8, c. 8, 10. Aphorism 8. "At Jus Privatum sub tutela Juris Publici latet."

<sup>2</sup> Comp. 1 Bla. Comm., p. 126, n. by Christian; Chipman, on Gov., p. 59. Whewell: El. Mor. & Pol., § 585, distinguishes between *social* freedom and *political* freedom.

various public guarantees by which private rights or liberties become identified with the public law. So far as the individual and relative rights existing under the English law, and which are called "liberties,"—"civil liberties,"—"the liberties of the subject,"—"the privileges and immunities of Englishmen," have a peculiar character, it is rather in the origin, duration and extent of the law in which they are founded, than in the characteristics of those mutual relations which that law establishes between private persons. For, regarded merely as existing in relations between private persons, the same individual and relative rights may be found under the law of other states or countries. The use of these terms always includes in some degree the idea of political liberty, and the foundation of private law.

§ 136. The political foundation of law in the colonies has already been in part indicated. It was a mark of these rights or liberties of the English colonist that they rested on "common law;" which, regarded only as a private law, or law determining the relations of private persons, was a law having a distinct basis in the will of the nation, as opposed to the will of any particular part or portion of the inhabitants exercising a separate or local power,<sup>1</sup> or of any person or body of persons in the realm, not identified, by public law, with the nation as a political unit: a law alterable indeed by the act of the supreme or sovereign power, and by that power as vested in a government; but that government—one which was assumed to be, by its parliamentary constitution, the representative and organ of a whole nation. The common law had therefore an integral existence in each part of the empire at the same time; being therein distinguishable from the concurrent rules of a number of independent provinces or localities.

<sup>1</sup> 2 Co. Litt. cap. 29. (4.) <sup>2</sup> Aut disseisietur de libero tenemento suo, vel libertatibus [Mag. Ch.] This word libertates, liberties, hath three significations:

1. First, as it hath been said, it signifieth the laws of the realme, in which respect this charter is called, charta libertatum.

2. It signifieth the freedoms that the subjects of England have."

<sup>3</sup> Glanvil's Pref. to Fortescue de Laudibus, p. 29, quoting Brompton as saying, after mentioning the three sets of local laws—West Saxon, Mercian, and Danish, prevailing in England: "'Iste rex Edwardus tertius (the confessor) unam legem communem edidit, quæ leges Edwardi usque hodie vocantur,' which, by the way, helps us to the original meaning of the phrase *common law* (and different from that in which it is now taken) which was therefore called *common* because it extended to all England, whereas before, different parts had been ruled by different laws."

It was also a law, in its ordinary operation, judicially received as of constant or customary existence; not as referable to some recorded act of the depositaries of supreme power, conferring those liberties as something which they might either give or refuse. It was a law not taken to exist irrespectively of political authority, but yet not taken to rest, in the first instance, on acts of positive legislation. In being derived from a judicial apprehension of natural reason, it was not indeed more *jural* than the statute law, but differed from it in not being so specifically devised and promulgated in reference to persons and things in and for a certain territory only. Therefore, so far at least as it defined relations of persons without reference to specific things in England, it was a law which might be taken to be a juridical indication of natural reason in reference to the relations of the persons to whom it applied, not in England only, where it originally prevailed as the territorial law, but wherever they might remain under the same national dominion. This personal character of the common law is shown when, in describing the liberties or rights created by that law, they are termed "the liberties of Englishmen."<sup>1</sup>

§ 137. As is shown in the passage from Blackstone before cited, and the writings of American jurists referred to in the same connection, it is not to be supposed, when the common law of England is spoken of as a personal law for the colonists, and as determining their rights and liberties in their new domicil, that the entire body of rules comprised under that name, in England, had an equal extent in the province. As has been shown in the first chapter (§ 23) the rights of persons may be distinguished into rights existing either in relations in respect to persons as the objects of action, or relations in respect to things as the objects of action. The law prevailing in any place or territory is therein a rule of action in reference to things, as well as persons, (though persons, or the actions of persons, are the ultimate objects of every law,) and it is plain that many things (either natural or legal things) which were, in England, the objects of action contemplated by the common law, did not exist in the colonies. A very considerable portion of that

<sup>1</sup> 1 Bl. Comm. p. 144.

division of the common law which is called by Blackstone the "law of things," was therefore not transferred with the colonists to America as a law personal to them; and, so far as the liberties of persons in England consisted in rights of action in reference to those things, they had no existence in the colony.<sup>1</sup>

The legal liberty of any person in a civil state cannot be fully defined without considering his rights of action in respect to things: yet those rights of action which exist in relations to other persons as the objects of action, without special reference to things, or without reference to specific things, may be taken to constitute his general liberty of action. Individual and relative rights, as defined in the first chapter, may thus be juridically recognized to be rights belonging to persons in reference to other persons, without reference to specific things; and the law of England determining and maintaining those rights, as rights of the native or domiciled inhabitant of England, without reference to what is called by Blackstone the *law of things*, may be called the law of the liberties or privileges of Englishmen—the civil liberties of the freeborn English subject. With this limitation in respect to things, the law determining the liberties of English subjects, in England, may be said to have accompanied the colonists as a personal law.

§ 138. Further it may be remarked, by way of defining what that liberty or degree of privilege, under the common law of England, *was not*, and as having an important bearing on the peculiar questions connected with this subject, that, so far as the liberties of British subjects, thus secured to them and resting on the imperial or national sovereignty, consisted in rights of persons in reference to things, they could only be rights in reference to such things as were known to the law of England: and that, so far as a right of property, or to property, was one of those liberties, it was only to such objects of possession as could lawfully be property by the law of England.

§ 139. The possession of liberty in any extended sense, or the enjoyment of a free condition or *status*, irrespective of its

<sup>1</sup> Compare also, Kent's Comm. II. 152. 8 Peters, 658. 1 Comstock, 31-36. 1 Mass. R. 60. 2 do. 584. Settlements in America, vol. I., pp. 303, 304. Vol. I. of Mass. Quart. R. 468-470.

connection with public law, must always, under any system of municipal (national) law, consist in the exercise of individual and relative rights. A free condition may however be attributed to a person who does not actually sustain those relations towards specific persons in which *relative* rights exist. A *legal capacity* for those rights is, however, taken to be an essential attribute of a free condition, whenever a distinction is made between liberty and its opposites, as contrasted results of private law ; though individual or absolute rights—rights in relation to the community at large, constitute the essential part of free *status* or legal condition. The English law determining individual rights and the capacity for relative rights may be called, more particularly than the rest, the law of the *status* or condition of those to whom it applied as a personal law.

§ 140. When the individual rights which are essential to the enjoyment of liberty of condition are declared to be the right of personal liberty, the right of personal security, and the right to the acquisition and enjoyment of private property, still the condition which they constitute cannot be apprehended without the complete analysis of the laws by which those rights are vindicated or maintained. In a definition of a state of liberty, as opposed to domestic slavery, or bondage correlative to a right of dominion in private persons, these three terms, in a general sense, may be taken to have the same meaning in all countries. But as defining the elements of *civil liberty*, as that term is employed by European and American authors, they are of little significance, unless stated in connection with the *guarantees* by which they are preserved. It would be going beyond the scope of the present treatise to describe the guarantees for the rights of private persons under the law of England at any particular period of its history :—habeas corpus, trial by jury, the rules of evidence, the independence of the judiciary, rights of counsel, publicity, utterance, &c., and above all, the definitive or positive nature of that law, in having a settled supremacy independent of the will and moral judgment of all who are not identified with the actual possessors of ultimate sovereign power. A marked peculiarity of the common law of England is the degree in which it unites the characteristics of public and



private law ; so that the exposition of private rights is never separable from that of a political constitution. These rights or guarantees, though attributed to ancient and customary law, have been, at different times, defined and maintained with different degrees of precision ; and their legal character has therefore greatly varied, even during the last two centuries.<sup>1</sup> The question, how far the common law of England, in being public law, was the same in England and America, was the question in which the revolution of the colonies originated. By the transplantation of the common law to each several colony, with a territorial extent therein, it acquired, in each, a new and separate character, as the local law of each. But still, so far as it was a law of personal condition, or the law of those rights which are commonly denominated personal rights, its progressive development was never independent or isolated in the several divisions of the Empire. To that extent it continued to be a national system, and the rights and guarantees, above spoken of, continued, in their progressive development, to be the same rights in respect to their juridical source, or to be rights under one and the same system of jurisprudence ; though maintained and exercised under the local or internal law of distinct political jurisdictions.<sup>2</sup>

§ 141. Under the relation of master and servant, as it has been known in different times and countries, an immense variety of reciprocal rights and obligations may be comprehended ; and the legal incidents of the relation have varied in England, during the period in which its "common law" has been historically known to exist, as much as in any other European country. Although, for more now than three quarters of a century, a condition either of chattel slavery, or of involuntary servitude, except by force of penal statutes, has been held to be contrary to

<sup>1</sup> For the charters of English liberties of the subject see, besides the English Statutes at Large, Co. Litt. 2d Inst. ; South Carolina Stat. at large, preface and pp. 72-129, containing, Magna Charta of King John (1215), Charter of Edward I. (1297), the Petition of Rights (1628), the Habeas Corpus Act, 81 Car. 2, c. 2. (1679), Bill of Rights, 1 William and Mary, sess. 2, c. 2 (1689). See also Lieber's Civil Liberty and Self Government. And for a summary of the principal usages and acts from which a popular and consolidated presentment of the public and private rights of the English nation, answering to a written constitution, at the present day might be made, see Wade's History of the Middle and Working Classes, Part III. c. 5.

<sup>2</sup> Compare ante, §§ 48-54.



the local or internal law of England, it was far from being so settled at the time of the establishment of the English colonies in America and of the grants of their respective charters. Villenage continued to exist in England until the year 1661; if, as Blackstone asserts, it may be taken to have been abolished by the act of that year, 12 Car. 2. c. 24, reducing all tenures to free and common socage.<sup>1</sup> In some of its forms, villenage, in England, was nearly equivalent to chattel slavery: the villein *in gross* or *at large* being, according to Littleton, "annexed to the person of the lord, and transferable by deed from one owner to another, and if he ran away from his lord, or was purloined from him, he might be claimed and recovered by action, like beasts or other chattels."<sup>2</sup>

But villenage in England, after the time of the Norman invasion, had always the character of a feudal relation, and was connected with the tenure of land. The legal personality of the villein, and a capacity for rights in some degree, was also acknowledged. If under the Saxon government there had been a class of absolute slaves,<sup>3</sup> it is supposed by Wright, in his treatise on Tenures, that the Normans, carrying out the feudal constitution of a civil state, admitted such slaves to the oath of fealty, creating the legal obligations of a legal person, which conferred a right to protection under the law, and raised the serf to a kind of estate superior to downright slavery, though inferior to every other condition.<sup>4</sup> The law protected the per-

<sup>1</sup> 2 Bl. Comm. 96. Lofft's Rep. 8.

<sup>2</sup> 1 Co. Lit. § 181.

<sup>3</sup> An historical Discourse of the Uniformity of the Government of England, by Nathaniel Bacon of Graies' Inne, (1647) p. 56. Speaking of *villeins* in the Saxon times,— "The most inferiour of all were those which were anciently called lazzi or slaves; those were the dregs of the people, and wholly at the will of their lord to do any service, or undergo any punishment; and yet the magnanimity of the Saxons was such" &c. —stating their merciful treatment of slaves; \* \* \* "and though the insolency of the Danes much quelled this Saxon noblenesse, yet it was revived again by the Confessor's laws, which ordained that the lords should so demean themselves towards their men, that they should neither incurre guilt against God, nor offence against the king; or, which is all one, to respect them as God's people and the king's subjects."

And see Wade's Hist. of the Middle and Working Classes, Part I., ch. 1. Turner's Anglo-Saxons, vol. iii., p. 91.

<sup>4</sup> Wright's Tenures, pp. 215–217. 2 Bl. Comm. 92. Wade's Hist. &c., p. 9: "In 1102 it was declared in the great council of the nation, held at Westminster, unlawful for any man to sell slaves openly in the market, which before had been the common custom of the country." The author does not give the authority: such a declaration would have been equivalent to a repudiation of absolute chattel slavery.

sons of villeins, as the king's subjects, against atrocious injuries of the lord; for he might not kill or maim his villein: and the latter had a right of action against his lord for the mayhem of his own person, or the murder of his ancestor. Neifes had also an appeal of rape, in case the lord violated them by force.<sup>1</sup>

Even in the times of Littleton and Coke it was said that villenage could exist only by prescription, or by confession in open court. And when most opposite to a free condition it had something of a local character, relating to the land of the lord to whom the villein services were due.<sup>2</sup> It was therefore an incident of those relations of persons to things, or of the relations of persons to other persons, in respect to those things which were not transferable with the English colonists to America, and did not therefore exist there under the common law, i. e. feudal estates, which were not established in America.<sup>3</sup>

§ 142. The relation of master and servant, known under the modern common law of England and the same law operating in the British colonies, with personal extent for the inhabitants who are of British race or descent, is a relation exclusively founded on, or arising out of, the voluntary contract of the parties.<sup>4</sup> The relation between a minor apprentice and his master, under the same law, is a substitute for, or a modification of, the paternal authority; and the reciprocal rights and obligations of the parties are derivative from the relation of parent and child. This relation, as an effect of the common law of England having personal extent, existed in all the colonies: being created under the administrative authority of the inferior courts, justices of the peace or other officers, to whom a *quasi*-paternal authority of guardianship had been delegated by special statutes, or who, in

<sup>1</sup> 1 Co. Litt. §§ 189, 190. In respect to the community at large the villein was a legal person, as much as any liber homo. 2 Co. Litt. cap. 1, (7): "Concessimus et dedimus omnibus liberis hominibus regni nostri, &c. These words in Magna Charta doe include all persons ecclesiasticall and temporall, incorporate, politique, or naturall; nay, they extend also to villeines, for they are accounted free against all men, saving against the lords." 2 Co. Litt. cap. 29, (1): "Nullus liber homo capiatur vel imprisonetur. This extends to villeins, saving against their lord; for they are free against all men, saving against their lord."

<sup>2</sup> 2 BL. Comm. 92-98. Wilkins's Leg. Saxon, p. 229, et cap. 65. Leg. Guliel. I. "Prohibemus ut nullus vendat hominem extra patriam."

<sup>3</sup> And see Neal v. Farmer, 9 Georg. R. 564.

<sup>4</sup> For a succinct account of the relation between master and servant after the extinction of villenage, see Wade's History &c. Part I.

being appointed for offices known to the common law of England, assumed it as an incident of office under that law : the rights and duties of the parties being determined by common law rules ; though the establishment of the relation was, in most of the colonies, regulated by special statutes.

§ 143. Though the relation of master and servant, as thus recognized under the common law of England and the colonies, is one which may modify in many important respects their rights and obligations in respect to third persons, yet, so far as the obligation of service has depended on contract or the voluntary choice of the servant, it does not appear ever to have been taken to create a right to that service as against other persons ; so that the act of decoying or inveigling that servant, from such service, would constitute a wrong which the law would remedy in maintaining the master's right. The right of the master being correlative to obligations on the part of the servant only, the law has given a remedy in such cases only against the servant. It is doubtful, too, whether even the forcible abduction of an adult servant could be resisted by the master, as possessing any specific right in respect to such servant, or as having any other capacity or right, in such case, than that of any third party aiding and assisting such servant in defence of his individual right to personal freedom.<sup>1</sup> If, however, the servant should be under age, whether apprenticed or serving with or without wages, the master has been regarded as standing in loco parentis ;<sup>2</sup> having a right, coupled with a duty, to resist such abduction. The right of the master, in the case of such minors, being also a right correlative to obligations on the part of third persons, or the community at large ; and it would appear to have been a right of personal custody maintainable at common law, by the remedial writs of habeas corpus and personal replevin. The master in this case standing in a position, as to third parties, similar to that of a husband, parent or guardian.

So far as the relation of master and servant has been founded on contract between them, it has been governed by the common

<sup>1</sup> In Hughes's Grand Abridg. p. 1299, it is held that a master may justify an assault in defence of his servant.

<sup>2</sup> 2 Kent's Comm. p. 261, (288 of 7th Ed.)

aw rules applicable to contracts. The English common law, as it has been received in America, has never enforced the contract, as against the party contracting to serve, by compelling a specific performance. It has only given a remedy between the parties in pecuniary damages, as in case of a breach of any other contract.<sup>1</sup>

§ 144. It has been shown in the first chapter that the unwritten or common law, in England as well as in every other country, being derived by a judicial recognition of natural reason applied to the necessary conditions of human existence,—in determining what principles are to be received as rules of natural reason with the force of positive law, the tribunals of each country must refer to standards indicative of the juridical will of the state from which they derive their authority. It was further shown that among these standards are those principles which are known from history to prevail generally among all nations, forming a general or universal jurisprudence—a historical *law of nations*—which must be received as part of the jurisprudence of the state; unless the local law of the state, derived from its own national usage and judicial precedent, or from positive legislation, contains principles promulgated with universal personal extent, having a contrary effect. Therefore in determining what that common law of England was which accompanied the British colonists in America as a personal law, it must be inquired whether, at the time of the settlement of the colonies, there were any principles of universal jurisprudence—historical *law of nations*—affecting the *status* or condition of natural persons, which could, in England, be judicially applied as part of the common law; and whether, at that time, the local law of England, or rather the law derived from its own several national usage, and its own judicial precedents or legislation (operating without reference to the existence of other states or nations), contained rules, having a contrary effect,

<sup>1</sup> 1 Blackf. Ind. R. 122, (1821) case of Mary Clark, a woman of color. Marg. note. "It is a general rule that covenants for personal service cannot be specifically enforced either at common law or by statute. The case of apprentices depends on parental authority, that of soldiers and sailors on national policy." The condition of adult servants indentured under contract, which was common during the colonial period, depended on special statutes. See *post*, ch. v.

which were so promulgated as to have universal personal extent in England, and therefore to prevent the judicial recognition and application of those principles of universal jurisprudence or the *law of nations*.<sup>1</sup>

§ 145. This inquiry into the principles of the *law of nations*, affecting personal condition, considered as part of the common law of England, will be examined in a separate chapter. But it is convenient here to remark, though actually by way of anticipation, that in the view of almost every historical writer who has treated of the establishment of laws in the American colonies, the private law of England, or the private law having territorial extent in England, during the period when the colonial patents and charters were granted, is taken to have attributed the individual and relative rights before spoken of as being called, in connection with their guarantees in the public law,—the liberties of Englishmen—the privileges and immunities of the free-born British subject,—without distinction of race, descent, or physical constitution, to all natural persons actually within the territorial limits of the British Isles; or at least to all native and domiciled inhabitants; subject only to the rights of others having the same general denomination, growing out of the relations of persons all equally privileged in respect to that law;—the relations of parent and child, husband and wife, master and servant, the relations of contract, those founded on the feudal tenure of land, and those incident to the punitive and remedial laws of the state. Personal liberty, in the sense of one of these rights, signifying the freedom to dispose of one's person and powers of body and of mind, without control by others who are not representatives of the ultimately supreme authority.

§ 146. When it is said that the law of nations is part of the common law of England,<sup>2</sup> it cannot be so said with propriety if by this it is intended that the international law,—meaning that rule of which states are the subjects, is part of that common law.

<sup>1</sup> Compare *ante*, § 99.

<sup>2</sup> As in 1 Bla. Com. 273. 4, *same*, 67. 1 Kent's Com. p. 1. *Triquet v. Bath*, 3 Burr. 1478. *Heathfield v. Chilton*, 4 Burr. 2015. *Case of Henfield*, by Judge Wilson, Duponceau, p. 3, and note. 3 Dallas, R. 392.

For the common law is *law* in the strict and proper sense, which this international law is not.<sup>1</sup> The common law is a municipal law (national, *jus civile*, *ante* § 9, n.) in being founded on the national sovereignty of England, as the absolutely independent authority for that rule of action which determines the relations of the individuals known as its *subjects*, according to the principles which define the existence and mode of action of sovereign states. But the historically known *law of nations*—universal jurisprudence, herein before defined, so far as it contains principles determining relations of private persons, is an indication and criterion of natural reason, to be judicially received, not as having any authority in itself independent of that sovereignty upon which the municipal law of England (national law—both internal and international according to its application) rests, but because already customarily received and allowed as an exposition of its juridical will, unless the law peculiar to the territorial dominion of that sovereignty, founded on local precedents or legislation, requires the application of principles having a contrary effect.

<sup>1</sup> *Ante*, §§ 11, 12.

**NOTE.**—As has been shown in the second chapter, the juristical conception of a universal jurisprudence or *law of nations* requires the recognition of some persons as alien, or as having sustained relations created by foreign laws; and the exposition of principles having that character cannot be looked for, in the juridical history of any one state or nation, before the time when a peaceful intercourse has subsisted, under its jurisdiction, between the native or domiciled subjects of the state and persons recognized as subjects of foreign states; that is, before a *private* international law has become a distinguishable part of the national law. (See *ante*, §§ 92–96). The thirtieth chapter of Magna Charta declares, “All merchants (if they were not openly prohibited before) shall have their safe and sure conduct to depart out of England, to come into England, to tarry in, and go through England, as well by land as by water, to buy and sell without any manner of evil tolles, by the old and rightful customs, except in time of war.” (See 2 Co. Ins. cap. 80). Unless this was only declaratory of an existing common law principle, it must be supposed that, before this, aliens had no legal rights in England, and that it is only after this period that a *law of nations* could find place in the common law, by the application of private international law. See Walker’s Theory of the Common Law, ch. XX.

## CHAPTER IV.

THE ESTABLISHMENT OF MUNICIPAL LAW IN THE COLONIES,—THE SUBJECT CONTINUED. OF PRINCIPLES OF UNIVERSAL JURISPRUDENCE, RELATING TO FREEDOM AND ITS OPPOSITES, ENTERING INTO THE COMMON LAW OF ENGLAND.

§ 147. It is proposed in this chapter to ascertain, from the history of jurisprudence among European nations, what principles, affecting natural persons in those relations which constitute a condition of freedom or of bondage under *private* law, were judicially known as part of the historical *law of nations* at the time of the planting of the colonies, and the date of their charters; and next, whether those principles could be applied, in England, as part of the common law derived from the judicial interpretation of natural reason, to determine the condition of natural persons.

This universal law or *law of nations*, it will be remembered, becomes a topic of judicial recognition by an international comparison of the effects of different systems of municipal law in the relations of persons considered as alien to some one jurisdiction.<sup>1</sup> A historical investigation of the *law of nations*, as forming part of the common (unwritten) law of any one state, involves therefore, in some degree, an exposition of the private international law of that state, as well as the private municipal (internal) law thereof. It is thus necessary, in this chapter, to anticipate somewhat the subject of a succeeding chapter, which

<sup>1</sup> *Ante*, § 94.



is—the private international law, in England and America, during the colonial period, affecting relations of freedom or of bondage.

§ 148. In the earlier periods of the existence of positive law (as the subject of jurisprudence is herein denominated in respect to its authority), when natural justice—the presumptive will of the state, was ascertained by the autonomous judgment of each judicial tribunal, according to its own apprehension of natural reason,<sup>1</sup> there could hardly be said to be any judicial rule, forming part of the municipal (national) law of any one state, which had, beyond any other part of that municipal law, a universal character, or the character of an exposition of the law of nature, or was more directly derived from the natural reason of mankind than any other legal principle. Still less, at a period when international intercourse was almost unknown, or considered beyond the pale of judicial authority, could there be any rule which might be considered a universal law, or *law of nations*: for it is only by the intercourse of persons subject to different municipal laws that a *law of nations* can be judicially distinguished. In the imperfect civilization and intercourse of nations in earlier ages the means of collecting and digesting judicial precedents were too limited to allow any settled exposition of natural reason, as a rule of action derived from a comparison of the laws of various states.

The jurisprudence of the several nations of remote antiquity must have contained numerous principles common to each, but, previously to a mutual knowledge of each other's institutions, there could be no definite acceptation of natural reason from the concurrent testimony of the various independent sources of positive law. The laws of the Roman Republic are the earliest of which it can be said positively that they were founded on a recognition of the force of the concurrent usage and legislation of various nations, as an indication of a rule of natural reason deserving to be judicially received by any one state. This recognition was made in legislative action if, as is commonly believed, the laws of the Twelve Tables, B. C. 454, were compiled by persons specially instructed to regard the laws of the

<sup>1</sup> *Ante*, § 29.



Grecian States,<sup>1</sup> and it has been shown, in the second chapter, in what manner, by judicial action, a part of the Roman law was always regarded not only as national law, but as an exposition of the law prevailing among all nations or among the more civilized. By the extension of the Roman dominion, the whole national law acquired more and more of this character, and this character or quality it has constantly had in every country in Europe: first prevailing, as the customary or common law, in countries which had been under the Roman dominion, and civilized by Roman influence, and then adopted by the northern invading nations, both as the law having territorial extent in the provinces conquered by them, and also as an exposition of the juridical wisdom of all nations and all preceding times: gradually supplanting the *personal* laws which they brought with them.<sup>2</sup> In this sense it has been the *common* law of the greater part of modern Europe, and of all those nations which constitute, in their own vocabulary, the civilized world. Its authority as law nowhere rests upon its intrinsic merit as an exposition of natural reason, but is a matter of the customary law of each nation; though in states which have boasted of a law of national origin, it has been generally referred to, judicially, as if its authority were dependent upon the subjective judgment of the tribunal, accepting it as pure natural right or reason.<sup>3</sup>

<sup>1</sup> See Diony. Halicar., Antiq., Lib. X., cap. 57. Heineccius: Hist. Jur. Civ. Lib. 1, c. 2, § 23, 24. Long's Disc., p. 56, n. Horæ Jur., pp. 30, 40. But Giambatista Vico held the XII. Tables to have been only a digest of the customary law of Latium; see London Law Review, vol. XX., p. 268; XXI., p. 98.

<sup>2</sup> On this subject see Savigny's Hist. of the Roman Law in the Middle Ages, first volume, translated by Cathcart; and Savigny's Heut. Röm. R., the last volume.

Sir Wm. Jones: Works, vol. III., p. 75: "It [the Code of Justinian] gives law at this time to the greatest part of Europe: and, though few English lawyers dare make such an acknowledgment, it is the true source of nearly all our English laws that are not of feudal origin."

Papers read before the Juridical Society, vol. 1, part I. London: 1855. Inaugural, by Sir R. Bethell, *S. G.*, p. 2: "It is now clear that the common law which existed in England at the time of the Norman invasion was in a great measure derived from the jurisprudence that had been introduced and administered by the Romans, during the 300 years of their dominion in Britain."

It has been a matter of controversy how far Bracton drew his work from the Corpus Juris: see Reeves' Hist., 2 vol., pp. 86, 87, and 4 vol., p. 570, where he calls Bracton the father of English law.

<sup>3</sup> See *ante*, § 34, and note; Domat: Civil Law, Pref., pp. 1, 2, and Prelim. Tr., c. xi., § 19. "But for the laws of nature, seeing we have nowhere the detail of them except in the books of the Roman law," &c. The Roman law may, or may not, be accordant with the laws of nature. Its authority with the tribunals of modern states

But, as the recorded historical testimony of the juridical reason of many nations and countries, its value has been so repeatedly acknowledged in English jurisprudence<sup>1</sup> that reference to it is indispensable to ascertain any legal rule which can be attributed to universal jurisprudence and received into the common law of England as the law of natural reason.

§ 149. The jurisprudence of the Roman state has been considered by many of the modern civilians as asserting the identity of *law* with all rules of right action binding on the *conscience of the individual subject*, to a greater degree than has been recognized in any modern system. This view would appear to be supported by the meaning given to such words as *justitia*, *jurisprudentia*, and *jus*, in the exposition of the basis of legal science given by many jurists of the later imperial period. But a particular examination of a very few of the specific topics of Roman jurisprudence would show that the *law* of judicial tribunals was confined with them, as with the moderns, to the enforcement only of those duties as legal which the supreme power had made such by positive enactment, or through definite juridical recognition and application of natural reason, and had accompanied by a remedial sanction.<sup>2</sup>

In the view of resting the foundation of law on a moral criterion, or of expressing its jural character, the Institutes of Justinian, Lib. I., tit. 1, § 1, give to the term *jurisprudence* a more extended signification than that allowed to it by limiting the meaning of law to the sense herein before given as the ordinary practical meaning of the word (*ante*, § 17). *Jurisprudentia est omnium rerum humanarum atque divinarum notitia*

depends upon judicial precedent—the fact that it has been recognized as an exposition of those principles which actually do prevail among all nations. But the theory of Domat on this point is very commonly held by English writers, in justifying a reference to the Roman law. See Browne: *Civ. & Adm. Law*, p. 4. Bowyer: *Univ. Pub. Law*, *passim*.

<sup>1</sup> Hale's *Hist. Com. L.*, p. 24. Holt, *C. J.*, in 12 *Modern R.*, 482. 8 Kent's *Comm.*, p. 490. Wheaton's *El. Int. Law*, *Introd.*, p. 22. Wheaton's *Law of Nations*, p. 81. Duponceau: on *Jurisdiction*, p. 86. Reddie's *Treatises*, *passim*. Dr. Duck's *Treatise on the Use and Authority of the Civil Law in the Kingdom of England*. Robertson's *Hist. Charles V.*, vol. I., note, xxv., BB.

<sup>2</sup> Mackeldey's *Comp.*, § 112. Tr. by Kaufmann. "Law was considered by the Romans as primarily founded on morality, and on a voluntary respect for all that was good and noble. In their view, compulsion was no essential element of a law," &c. The translator's note, to this section, points out the error of this statement.

justi atque injusti scientia; a definition nearer to the modern conception of moral philosophy. *Justitia* is used in the sense of the English words uprightness, honesty, integrity; *justitia est constans et perpetua voluntas jus suum cuique tribuendi*; *jus* here having its sense of *a right*, while immediately following *jus* is used in the sense of law as *a rule*,<sup>1</sup> *juris præcepta hæc sunt, honeste vivere, alterum non lædere, suum cuique tribuere*; without indicating the authority which is to determine what is *honestum*, what it is *alterum lædere*, and what is *suum cuique*, or the right of every man.

§ 150. In the analysis of the law which immediately follows these definitions, the first distinction is made according to the

<sup>1</sup> By some of the German jurists, *jus*—taken in the sense of a rule of action,—*jus est norma agendi*—is said to have its *objective* meaning, and when used with the signification of a right,—*jus est facultas agendi*—it is said to have its *subjective* sense. Vide Mackeldey's Comp., Introd., § 2. Savigny: Heut. R. R., § 5.

It may be doubted whether this designation of the different uses of the word *jus*—founded on a well known *Kantian* distinction, is even philosophically correct; because either *a law* or *a right*—the effect of a law—may be considered both objectively and subjectively. And it is here important to notice that, in *jurisprudence*, both are used objectively only, that is, each is regarded as having an existence independent of the moral sense of the concipient person.

The subjective apprehension of *jus*, in the sense either of a rule or of a right, properly occurs only in ethics, where the law or the right is conceived of as something that *is* because it *ought* to be: that is, in fact, as something which results from the moral nature of the concipient: whereas, in *jurisprudence*, *jus*—a law, and *jus*—a right, are conceived of as the result of the *will* of an assumed legislator.

Bentham, Introd. Pr. Morals and Legisl., ch. XVII., 23, note, employs the terms abstract and concrete to designate the subjective and objective conceptions of *jus* in the sense of the rule—*norma agendi*. “In most of the European languages there are two different words for distinguishing the abstract and the concrete senses of the word *law*; which words are so wide asunder as not even to have any etymological affinity. In Latin, for example, there is *lex* for the concrete sense, *jus* for the abstract: in Italian, *legge* and *diritto*: in French, *loi* and *droit*: in Spanish, *ley* and *derecho*: in German, *Gesetz* and *Recht*. The English is at present destitute of this advantage.

“In the Anglo-Saxon, besides *lage*, and several other words for the concrete sense, there was the word *right*, answering to the German *Recht*, for the abstract; as may be seen in the compound *folc-right* and in other instances. But the word *right* having long ago lost this sense, the modern English no longer possesses this advantage.”

But the terms *Recht*, *diritto*, *droit*, &c., are also used, in *jurisprudence* proper, in the sense of *facultas agendi*, the sense of the English term *a right*; and this is a concrete sense as much as that of *Gesetz*, *legge*, *loi*, &c. In English, the substantive word *a right* is used only in the sense of *facultas agendi*, while the words *Recht*, *diritto*, *droit*, &c., signify, in their respective languages, not only this but also *a rule which is right in the abstract*, that is, the rule of natural equity: which may, or may not, be identified with *lex*—the positive law. Comp. Dig. Lib. I., tit. 1, § 11: Paulus: libro XIV., ad Sabinum. *Jus pluribus modis dicitur. Uno modo, quum id quod semper sequum ac bonum est, jus dicitur, ut est jus naturale.* But, in the *jurisprudence* of every nation, positive law is a jural rule, (*leges juris*); and the *Recht* and *Gesetz*, *loi* and *droit*, &c., are presumed to be identified. And see Austin: Prov. of Jurisp., p. 305, note, p. 308, note, in respect to this use of the words *jus* and *Recht*.

object or relations of persons on which a law operates. Hujus studii duæ sunt positiones, publicum et privatum. Publicum jus est, quod ad statum rei Romanæ spectat, privatum, quod ad singulorum utilitatem.<sup>1</sup> Here *publicum jus* appears to be equivalent to what would now be called the public law of some one state, public municipal law, or constitutional law; or, if a more extended meaning is to be attributed to it, it may be taken to correspond with what the moderns denominate political law, or the science of political ethics, and that only with reference to the relations of a single state.<sup>2</sup> In the mind of the Roman law-giver, indeed, quod ad statum rei Romanæ spectat, comprehended the laws of the empire of the world, and, so far as compatible with the admission of supremacy in that single state or nation, the idea of international law in the modern sense.<sup>3</sup>

§ 151. The analysis of private law, which next follows, is founded upon the nature of its origin. Dicendum est igitur de jure privato, quod tripartitum est: collectum est enim ex naturalibus præceptis, aut gentium, aut civilibus. From the immediate sequence of the definition of natural law as being that quod natura docuit, it may be taken to be identical with "natural precepts." But this natural law, as there defined, can hardly be considered a part of public or private law in the primary meaning of the word as a rule of action. The definition is only a recognition of a state of things independent of human action, or a law in the secondary sense; and includes not only the nature of man but of all animated existences. Jus naturale est quod natura omnia animalia docuit. Nam jus istud non humani generis proprium est, sed omnium animalium, quæ in cælo, quæ in terra, quæ in mari nascuntur. Hinc descendit

<sup>1</sup> Vinnius: Comment. Lugd. Batav. 1726, B. 1, tit. 1, not. a Heinecc. "Quod ad statum Rom. etc. Quod a utilitate publicum est, non quod sola auctoritate; est enim hæc divisio a fine sumpta, non a causa efficiente. Singulorum utilitatem. Quod privatim ad cujusque civis rem pertinet familiarem. Quanquam et hoc per consequentiam publice, et illud privatim, utile."

<sup>2</sup> Mackeldey's Compendium, p. 125, note by Kaufmann. Compare ante, § 25 and notes.

<sup>3</sup> Virgil: Æneid, B. VI. l. 851.

"Tu regere imperio populos, Romane, memento."

Gravina; de Rom. Imp. §§ 1. 2, and Gravina: Origines L. II. § 10. Huber. Conf. Leg., Lib. I., tit. 3; Lib. II. tit. 3. § 1. "In jure Romano non est mirum nihil hac de re exstare, cum populi Romani per omnes orbis partes diffusum et equabili jure gubernatum imperium conflictui diversarum legum non seque potuerit esse subjectum." Wheaton: Int. L. p. 20.

maris atque foeminae conjunctio, quam nos matrimonium appellamus ; hinc liberorum procreatio ; hinc educatio ; videmus etenim cetera quoque animalia istius juris peritia censi.

§ 152. The distinction next drawn between jus civile and jus gentium, introduces a law of nations, as a source of the private law, in a sense more nearly corresponding with the modern idea attached to the terms *law of nature* and *natural law*, when employed in jurisprudence, and with 'universal law' as it was defined in the first and second chapters. Jus autem civile vel gentium ita dividitur ; omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur. Nam quod quisque populus ipse sibi jus constituit, ipsius civitatis proprium est vocaturque jus civile, quasi jus proprium ipsius civitatis. Quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peræque custoditur, vocaturque jus gentium, quasi quo jure omnes gentes utantur. This law of nations, the offspring of naturalis ratio, is afterwards made to overrule the natural law, jus naturale, in the origin of slavery ; though that natural law, if implied in 'natural precepts'—naturalibus præceptis, is before made a source of private law—the jus privatum.<sup>1</sup> The definition of jus

<sup>1</sup> Mackeldey's Compendium, p. 126 ; Kaufmann's note. Savigny: Heutige Röm. R. Vol. I. Appendix I. (Tr.) "The Roman jurists notice two divisions of law, founded upon the general nature of its origin. One is a division into two parts: viz., 1, Law as it existed for the Romans only, *civile* ; 2, Law as existing for all nations, *gentium* or *naturale*. The other is a division into three parts: viz., 1., Law existing for the Romans only, *civile* ; or 2, existing for all nations, *gentium* ; or 3, existing both for all mankind and for the brute creation, *naturale*.

"I not only consider the first of these divisions the only correct one, but I also assert that it is even to be regarded as the ruling division among the Roman jurists, and that the other can only be regarded as an attempt at an extension of the subject which never received general recognition ; nor ever had any influence in determining particular questions of law. The division into two parts is most carefully carried out by Gaius, in several instances. He places this division at the introduction of his work without the recognition of a third part. Jus gentium is with him the older portion, as ancient as the human race. It arises from the naturalis ratio of all men ; hence he elsewhere names it jus naturale ; as in referring the natural acquisition of property by voluntary exchange, in one place to jus naturale, and in another to naturalis ratio. This division in two parts is found also with Modestinus, Paulus, Marcian, Florentinus and Licinius Rufinus, — \* \* The division into three parts is most distinctly made by Ulpian, and after him by Tryphonius and Hermogenian. It rests on the following theory. That there was a time wherein men knew only such relations to each other as were common to them and the brute creation ; those of the sexes, generation, and education. Thereafter followed a second period of time, wherein states arose ; slavery, private property and obligations were introduced : and this in like manner among men wherever found. Lastly arose law in each state as peculiar to itself ; partly by the

civile, in this place, is derived from its origin, or the source to which in judicial apprehension it is referred for its existence, that is, the will of some one state or nation, and it is therefore also here called 'its own,'—*proprium*. After this definition the Roman people is said to use not only its own law, *proprium*, but also the principles of this *law of nations*, as the dictates of natural reason, without further mention of 'natural precepts'—*Et populus itaque Romanus partim suo proprio, partim communi omnium hominum jure utitur*. And in most instances wherein the term *jus civile* is used in the Roman law it means all that the Roman state uses, *utitur*, or enforces as a rule of action; that is, it includes both the *jus civile*, or *proprium*, and the *jus gentium* as here defined; and is equivalent to the term 'municipal law' as employed by Blackstone, or to the term 'national law' according to Bentham's terminology.

§ 153. The *jus publicum*, whether exclusively relating to internal, or to external relations also, must have had the same origin in the will of the state, or in the rules of 'natural reason,' being also a part of the law used by the Roman people. International law, so far as it existed, and whether included under that here called *public law*, or not, is implied to rest also on the *law of nations* or principles commonly received among all mankind, by the description of the origin of slavery, which is justified on those principles while it is ascribed to wars, which are necessarily international, and are also justified by the same 'law of nations.' *Jus autem gentium omni humano generi commune est. Nam usu exigente et humanis necessitatibus gentes humanæ quædam (jura) sibi constituerunt; bella etenim orta sunt et captivitates secutæ sunt et servitutes; by which are meant, not private wars or piracies,' but those appeals to force*

modification of those general institutions by particular circumstances, partly by the addition of new institutions or rules. \* \* \* On this particular point the Institutes of Justinian take a very inconsistent position. The text of Ulpian is first used, giving the tripartite division, and making it apply to the origin of slavery. Then the text of Gaius, Marcian or Florentinus is either followed in terms, or plainly referred to. One passage is particularly remarkable, where the words of Gaius are used, but with the express addition that *jus naturale* is the same as *jus gentium*, and that this had already before been so stated; § 11, I. *de dir. rer.* (2, 1.) *quarundam enim rerum dominium nanciscimur jure naturali; quod, sicut diximus, appellatur jus gentium; quarundam jure civili.*" Compare on this subject, Austin, *Prov. Jurisp.* 188-190.

<sup>1</sup> Huberus, *de Jure Civitatis*, lib. 2. c. 8. § 8. "Quod si bellum caret solemnibus



which the natural reason of mankind has hitherto continued to justify, as remedies between sovereign states. While slavery is thus justified as being accordant with natural reason, and therefore with natural law, so far as it can be recognized in jurisprudence, the freedom of mankind is asserted under the natural law, in the sense of the statement of a condition of things anterior to the authority of nations or of society: in which sense of the words all men would be taken to be naturally free from any positive law, that is, from all those rules of action which are enforced by society, or by states. The sentence last quoted from the Institutes is thus continued. *Bella etenim orta sunt et captivitates secutæ et servitutes, quæ sunt naturali juri contrariæ. Jure enim naturali omnes homines ab initio liberi nascebantur*; and in Title 3, §§ 2, 3, 4,—*Servitus autem est constitutio juris gentium, qua quis dominio alieno contra naturam subjicitur. Servi autem ex eo appellati sunt, quod Imperatores captivos vendere ac per hoc servare nec occidere solent; qui etiam mancipia dicti sunt, eo quod ab hostibus manu capiuntur. \* \* \* fiunt [servi] jure gentium, id est captivitate.* And in Title 5, § 1, on manumission, it is said, *Quæ res a jure gentium originem sumsit; utpote quum jure naturali omnes liberi nascerentur; nec nota esset manumissio, quum servitus esset incognita. Sed posteaquam jure gentium servitus invasit, secutum est beneficium manumissionis.* Seeming to mean, that though in a primæval state, or a state of nature as opposed to a state of society, or as originally created, men must be considered equally free, yet, in consequence of their natural passions and infirmities, a necessary condition of things has arisen in the social state, a *usus exigens et humana necessitas*, from which natural reason justifies slavery.<sup>1</sup> This view of the origin of slavery the Romans held in common with all the nations of

*juris gentium requisitis, non sunt capti jure servi, proinde nec ejusmodi tacita oritur obligatio; ut in his qui piratico aut latrocinio barbarorum capiuntur.*"

<sup>1</sup> In order to reconcile the language of the Institutes, some civilians distinguish a *jus gentium primærum* and a *jus gentium secundarium*. *v.* Vinnius: *Comm. Lib. I. Tit. 2, 3*, on this title of the Institutes. Merlin: *Repertoire de Jurisprudence*, Tom. V., p. 291, speaks of *le droit primitif des gens*, and *le droit des gens secondaire*. And St. Thomas Aquinas makes a similar discrimination of a secondary law of nature identical with the *law of nations*; as quoted in Bishop England's Letter II., giving the earlier Christian authorities that slavery is a legitimate consequence of sin.

antiquity. It was in fact a principle *quod inter omnes populos persequere custoditur*, a maxim of the law of natural reason, or of 'universal law' as then understood, that slavery might rightfully exist as a consequence of captivity in war:<sup>1</sup> and being a consequence of public wars, sanctioned by the rules of action between nations, it was at that time a principle of the international law, so far as any such international law could be said to exist.<sup>2</sup>

§ 154. The relation thus originating in war and under international law was, among the ancients, universally taken up and sustained by the internal or municipal law of each nation, *jus civile*.<sup>3</sup> And under the sanction of municipal law it was also made a consequence of other circumstances than captivity in war; as of birth; since the child of a slave mother became also a slave; and also by the voluntary act of the person enslaved; *Inst. Lib. I. tit. 3, § 4: Servi aut nascuntur, aut fiunt; nascuntur ex ancillis nostris; fiunt ex jure gentium, id est ex captivitate, aut jure civili, quum liber homo major viginti annis ad pretium participandum sese venundari passus est. In servorum conditione nulla est differentia.* Here the origin of slavery by voluntary sale is attributed to *jus civile*, which here corresponds to municipal or internal law. The inheritance of slavery is not here attributed either to the *jus civile* or to the *law of nations*, it is merely stated as a recognized principle; but from its ad-

<sup>1</sup> Xenophon: *Cyrop.* L. vii. c. 5, 78.

<sup>2</sup> War and peace being rudely definable as contraries, war was the normal condition of international intercourse between nations not equally civilized, that is, not equally recognizing a rule of peaceful intercourse; and slavery might originate under such a condition of hostility, though not one of open war. Thus, *Dig. L. 49, tit. 15, § 5, 2. Nam si cum gente aliqua neque amicitiam, neque hospitium, neque foedus amicitiae causa factum habemus, hi hostes quidem non sunt; quod autem ex nostro ad eos pervenit, illorum fit, et liber homo noster, ab iis captus, servus fit, et eorum. Idemque est, si ab illis ad nos aliquid perveniat.*

<sup>3</sup> *Jus civile*, in a sense relating to its extent, *national law*, including *jus gentium*—not opposed to it, in the sense of *jus proprium*.

Quintus Curtius: *Lib. 7, c. 8: "Inter dominum et servum nulla amicitia est, etiam in pace belli tamen jura servantur."* The *jura* were the same, only as the rights of the master were always founded on *jus gentium*. The municipal law did not recognize any incongruity between the relation of master and slave and a peaceful condition of society.

A slave condition was also sometimes made the consequence of desertion from military duty, or crime; freed men for ingratitude towards patrons, and women for intercourse with slaves were liable to loss of freedom. Hüne's *Darstellung über Sklavenhandel* (Göttingen, 1820) vol. i. p. 95: cites Waldeck; c. l. § 63 n. a. Heinec. c. i. § 88.



mitted universality it was probably considered a principle of the *law of nations*, *constitutio juris gentium*. In Tit. 8, from the universal prevalence of the idea of absolute dominion in the master over the slave, and of the slave's incapacity to acquire any thing as property, distinct from the property of the master, it is argued that that property and that disability rest upon the same foundation as slavery from captivity. In potestate itaque dominorum sunt servi. Quæ quidem potestas juris gentium est. Nam apud omnes peræque gentes animadvertere possumus, dominis in servos vitæ necisque potestatem esse, et quodcunque per servum acquiritur, id domino acquiritur; and hence it might be inferred that, as the dominion which prevented the slave from having the rights of a legal person, even in respect to his own offspring, was founded on the *law of nations*, the results of that dominion had the same legal character.<sup>1</sup>

§ 155. The force to be attached to the expression, *constitutio juris gentium*, must be gathered from the comparison of the prevalence and judicial recognition among all nations of other relations which are ascribed to this law. The Institutes refer to the same *jus gentium*, the origin of the various forms in which property is held and transferred, as being equally recognized, among all nations; Lib. I. Tit. 2, § 2. Et ex hoc jure gentium omnes pæne contractus introducti sunt, ut emptio, venditio, locatio, conductio, societas, depositum, mutuum et alii innumera-biles. And Lib. II. Tit. 1, § 4: Riparum quoque usus publicus est jure gentium, sicut ipsius fluminis. And § 5: Littorum quoque usus publicus juris gentium est, sicut et ipsius maris; &c.<sup>2</sup> By ascribing the right of the master and the incapacity

<sup>1</sup> Waldeck's Inst. L. I. tit. 3. "Ex juris principiis, fœtus, tamquam accessio ventris ad dominum ventris pertinet." Heinecc., J. Nat. et Gen. L. I., § 252, II. § 81.

<sup>2</sup> The whole of the first five titles of this second book of the Institutes are expressly called *jus gentium*, as contrasted with *jus civile*. Inst. L. ii. Tit. 5, § 6.

The common right of using the sea shore and the sea, which is here spoken of, is the right of private individuals as against other private persons—a right under private municipal law (comp. Inst. L. i. tit. 1, § 1). It is not that freedom of the seas to all nations which makes a prominent topic of modern public international law. It may be noticed, however, in this connection, to avoid the confusion which has attended the use of the term, that the *jus gentium* of the Roman lawyers was exhibited in the application of human reason to the relations of public as well as private persons, and might thus form a part of what is now called public international law, *jus inter gentes*. Thus Dig. Lib. i. tit. 1, § 5: Hermogenianus, Libro i. juris epitomarum. Ex hoc jure gentium introducta bella, discretæ gentes, regna condita, dominia distincta, agris termini positi, ædificia collocata, commercium, emtiones, venditiones, locationes, conductiones,

of the slave to the same law of nations, without reference to the origin of the relation, (in servorum conditione nulla est differentia) it seems to be considered a condition or relation which should be everywhere recognized, and maintained of course in every municipal or international jurisdiction.

§ 156. The nature of this relation was the holding of men as property, and therefore as things, not persons: and therefore in the Institutes, Lib. II. title 1, treating of the nature of things as opposed to persons, de rerum divisione et qualitate, in § 17 it is said: Item ea quæ ex hostibus capimus, jure gentium statim nostra fiunt; adeo quidem ut et liberi homines in servitutem nostram deducantur. For, though slaves, servi, are distinguished, as natural persons, from freemen, liberi, in Titles 3 & 8, their condition is also frequently spoken of, by the civil jurists, as distinguishing them as legal things from legal persons; a legal person being a natural person having rights, and a slave having none, in the view of the law, any more than other objects of possession.<sup>1</sup> As is shown in Inst. L. I. tit. 8, § 1, the power of the master was for life and death, in theory; and often illustrated in practice, as appears from history and literature.<sup>2</sup> If the slave was considered entitled to any rights as a human being,

obligationes instituta, exceptis quibusdam quæ a jure civili introductæ sunt. From which it appears that the *jus gentium* of the Romans was either public or private law according to the character of the persons or relations to which it was applied. Mr. Wheaton in his "Law of Nations," pp. 26-29, apparently assuming that the moderns would not have denominated public international law "the law of nations," if the Romans had not before called the same thing *jus gentium*, insists that by *jus gentium* the Romans intended that part of their civil law which they used as public law in reference to other nations. But in fact, as appears by the above citation from the Digest, it was a universal jurisprudence, which the judicial officer referred to as an indication of natural reason in all matters affecting private persons. Mr. Wheaton, by asserting that the private law which the Romans knew as *jus gentium* was not known by the recognition of its historical prevalence, but was simply that part of their own law which the Romans thought *naturale*, comes to the conclusion that *jus gentium* is immutable. It is true that the Romans knew no *jus gentium* that was not already part and parcel of their own national law—*jus civile*, (see Wheaton's Intern. Law, p. 27, citing Savigny and Waechter,) and every tribunal recognizing a *jus gentium*, or universal jurisprudence, must assume that it is included in the law of the land. How this may be, has been shown in the second chapter.

<sup>1</sup> Mühlenbruch; Pandectarum Doctrina, p. 195. "Familia appellatio non ad personas solum refertur, verum etiam ad res, adeoque ad hominum, qui instar habiti sunt rerum, i. e. servorum quoddam corpus." Kaufmann's Mackeldey, p. 127; editor's note: "The Romans made a distinction between *homo* and *persona*; because they regarded slaves not as subjects of rights, but as objects of rights, in the same manner as things." And see Taylor's El. Civ. Law, p. 429.

<sup>2</sup> Juvenal Sat. vi. l. 219.

the support of those rights was left to the influence of motives of humanity, and not enforced by any rule prescribed by the state, previously to the constitution of Antoninus referred to in the second section of the last-mentioned Title. Though in cases of extreme severity the supreme power might occasionally have interfered *ex post facto*, to transfer the slave to another master, without establishing any general recognition of his legal personality: as in the case of the slaves of Julius Sabinus, spoken of in the same Title: and this extraordinary intervention seems to have acquired the force of a general law.<sup>1</sup>

§ 157. This attribution of the condition of slavery to the *jus gentium*, as contrasted with their *jus civile*, which was thus made by the Roman jurists, was in perfect harmony with the juridical action of all other nations of antiquity.<sup>2</sup> For not only had that condition been constantly existing among all nations from the earliest historical times, but it was nowhere regarded as a relation of a local character, or one specially adapted to local circumstances; this is proved by the fact that the condition was recognized in private international law so far as it could be said to exist; the relation between the master and the slave being maintained not only in the jurisdiction wherein it began its legal existence, but also being carried out or realized in other jurisdictions to which they might remove; it was sustained equally between alien as between native subjects, and property in slaves was recognized in the transactions of commerce between persons of different nations.

It is in view of this character of slavery—that of being a legal condition, universally recognized by the natural reason of mankind manifested in civil institutions,<sup>3</sup> that, before describing

<sup>1</sup> Heineccius: *Hist. Jur. Civ. Lib. i. § 174.* Smith's *Dict. Antiq. Servus.* Other laws for the protection of the slave, *Lex Petronia*, *Dig. L. 48, tit. 8, § 11; L. 18, tit. 1, § 42.* *Cod. iii., tit. 38, 3, 11.* Constitution of Claudius; *v. Suetonius, Claud. 25.* See also Savigny, *H. R. R. Bd. 2, p. 34.*

<sup>2</sup> The laws of Menu recognized several kinds of slavery, see H. St. George Tucker's *Memorials of Indian Government*, London, 1853, p. 484. In ascribing slavery to the law of nations it is a very common error to use that term not in the sense of universal jurisprudence—the Roman *jus gentium*—but in the modern sense of public international law, and to give the custom of enslaving prisoners of war, in illustration: as if the legal condition of other slaves who had never been taken in war were not equally *jus gentium* according to the Roman jurisprudence. See Mr. Webster's speech, 7th March, 1850; *Works*, vol. v. p. 329. 9 Georgia R. 581.

<sup>3</sup> Whatever may have been the opinions of the great moralists of antiquity as to the

the rights of persons, the Institutes begin with the simple declaration, that human beings are either freemen or slaves, Lib. I. tit. 3. *Summa igitur divisio de jure personarum hæc est, quod omnes aut liberi aut servi.*<sup>1</sup>

§ 158. Whether the rules historically known as the *law of nations*—*jus gentium*, which judicial tribunals might recognize as a criterion of natural reason, to be applied in international or municipal law, have continued to be the same for modern times as anciently, is a question of fact to be learned from the history of municipal and international jurisprudence among all nations: each having equal right to judge of the dictates of natural reason applied to the conditions of human existence, and to manifest their judgment in their several national law (applied either as internal or international law within their own jurisdictions), and in the formation of that code of general international intercourse which is, in an imperfect sense, denominated a law, of which they are themselves regarded the subjects.<sup>2</sup>

§ 159. It must be remembered at the same time, that, in consequence of the nature and mode of application of that which is thus denominated international law, or law of nations in the sense of a rule of which nations are the subjects, it has never changed simultaneously among those nations professing to recognize it: and, as a distinct class of rules, is still confined to its recognition and application among Christian nations; and in a more limited degree, between them and the Asiatic and Mo-

expediency, propriety or ethical fitness of the relation between the master and the slave, it is certain that they constantly acknowledged its legality. Aristotle (Pol., L. i. c. 2) and Plato (Rep., L. v.) opposed the enslavement of Greeks when taken prisoners of war by other Greeks. But the former regarded slavery as a relation properly existing in every civil society; and the latter seems to have considered it a necessary evil. If they recoiled from the idea of treating a human being as a chattel, or brute object of the action of others, they each contemplated the existence of a servile class as a necessary constituent of human society. See Wallon: *Hist. de l'Esclavage dans l'Antiquité*, 1<sup>re</sup> Par. c. 11;—a very full account of the opinions of the leading minds of Greece on this point.

Whatever may have been Cicero's doctrine about the foundations of civil law in natural justice, he was himself an owner of slaves, and called on his friends to aid him in recovering them when they ran away. See *Ciceronis Epistolæ ad Familiares*, Lib. i. ep. 2, § 4, 14, Cic. ad Quintum fratrem; Lib. v. ep. 9, § 2, Vatinius ad Cic., *ad fin.*; Lib. xiii. ep. 77, § 3, Cic. ad P. Sulpicium, Imperatorem.

<sup>1</sup> The name of the Title is *De Statu hominum*; the slave was *homo*, and not *persona*; it is no division of the rights of persons to say some men have the rights of persons and some have not. See *ante* § 44.

<sup>2</sup> Compare §§ 10, 19, 39.

hammedan sovereignties;<sup>1</sup> the intercourse of those nations, recognizing such law, with others not knowing it, being always presumed to be regulated by that part of the international law which has been sometimes called 'the natural law of nations,' that is, by general principles of morals applied to public relations: the application being professedly made according to the moral sense of the, so called, civilized nations, assuming a superior knowledge of the dictates of enlightened reason.'

§ 160. During the later period of the Roman empire the diffusion of Christianity gave additional force to ideas of humanity and benevolence, as rules of duty in social action independent of laws enforced by the state, and may be supposed to have moderated the severity of the ancient slavery, both as the effect of international wars and of municipal regulations: at least between those professing a faith which required a distinct recognition of individual capacity and responsibility in all natural persons, and which, by constituting all its adherents into a spiritual commonwealth, established a peculiar equality between them; comparing them to members of a family, in having such a bond of union.' But whatever change may have taken place in consequence does not appear to have been made by any systematic interference of the civil power. It is to be remembered that the code of Justinian, though digested from ancient laws, was the code of a Christian state and sovereign;<sup>4</sup>

<sup>1</sup> Heffter: *Europ. Völkerr.* § 7.

<sup>2</sup> The opinion of Dominic De Soto, de *Justitia et de Jure*, quoted by Mackintosh, *Hist. Eth. Philos.* p. 110, was, that there can be no difference between Christians and Pagans, "for the law of nations is equal to all mankind." It is doubtful whether international law or universal (private) law was intended by this author; but, in either sense, it is not a correct statement of what the law of nations was at that time, as historically known. The author, as many writers since his time have done, confounded the *jus gentium* with his own idea of natural justice.

<sup>3</sup> Grotius: *B. et P.*, Lib. I. c. i., 14, 15. Huber, de *Jure Civitatis*, lib. 2, ch. 3, § 6. Lactantius, *L. v. Div. Inst.* c. 16. "Facile inde contigit nedum ut Christiani servos suos, præsertim Christianos, veluti fratrum loco haberent."

<sup>4</sup> Proæmium to *Institutes* begins: "In nomine Domini nostri Jesu Christi, Imperator Cæsar," &c. Constantine, the first Christian emperor, died A. D. 337. Justinian died A. D. 565.

See statement of Roman legislation respecting slaves from time of Hadrian to Theodosius the Great; Blair: *Slavery among the Romans*, Ch. IV., pp. 85-89, and Wallon, *Hist. de l'Esclavage*.

Guadentius, de *Justiniani sæculi moribus*, ch. XIII. (Meerman's *Thesaurus*, Vol. III. p. 679), thinks it most probable that captives in war, even if Christian, were made slaves under Justinian.

and the early church, even in those territories where it held civil as well as ecclesiastical power, did not abolish the relation, or prohibit its future inception; but appears to have recognized it as lawful, even between Christians, though gradually modifying it, by using its spiritual authority to enforce the dictates of humanity, and to cause a legal recognition of the personality of the slave, and of a capacity in him for some rights in social and family relations, though still in a state of servitude.<sup>1</sup>

§ 161. By this change in the legal character of his condition the slave became a legal member of the civil state, as distinguished from property; and his servitude, however burdensome, lost its support and foundation in the universal law, or *law of nations*, by losing its chattel character, and derived its support from the law peculiar to a single state, for the slavery known to the *law of nations* was the simple condition of chattel-slavery.<sup>2</sup>

§ 162. The slavery which existed among the heathen nations of northern Europe, from the earliest times, was probably

<sup>1</sup> Walter; Lehrbuch des Kirchenrechts, § 348. Corpus Jur. Canonici. Decreti, Para. i. Distinctio XV. Gregorius Papa I., anno 596. Roma in Campaniam. In libertatem vendicentur servi, qui ab infidelitate ad fidem accedunt. Distinctio LIV. Servi sine dominorum consensu et libertate non ordinantur. A letter of manumission by the same prelate of some of his own slaves is cited, Robertson's Hist. Charles V., vol. I., sect. 1, note XX, in which he speaks of slavery as contrary to an original or natural state of freedom. Bishop England's fifth letter cites various authorities. See also Wallon; Hist. de l'Esclavage dans l'Antiquité, Partie III. Blair: Slavery among the Romans, pp. 49-72. Ward's Hist. of Law of Nations, vol. II. p. 27. Gudelin, de Jur. Noviss., Lib. I. c. 4. 5. Fletcher's Studies on Slavery, pp. 327-331; and the note above cited in Robertson's Charles V.

The history of the early Church records the efforts of many of its prelates in favor of emancipation; and there is no doubt that the abolition of the ancient chattel slavery is mainly attributable to its influence. But whether the writings of those prelates can be cited here, in tracing the historical *law of nations*, on this point, depends on the question whether they held the temporal power of legislation, or not. For, however valuable, in an ethical point of view, their testimony to the law of nature may be, it will have no force in proving what the actual *jus gentium* of their time may have been; though it may have been a means of changing that law. Compare Bancroft's Hist. U. S., p. 163. (See ante, p. 95, note, on the relative positions of the *jus gentium*, and the Canon law.)

Imp. Leonis Aug. (Leo, the philosopher, died A. D. 911.) Novellæ constitutiones, IX., X., XI.; that slaves should not become free by taking holy orders, if without the knowledge of their masters.

It is difficult to judge how far the ecclesiastical persons, whose efforts in their times in favor of manumission are recorded, would have opposed serfdom, in forms nearly as much opposed to free condition, according to modern ideas. The ecclesiastical corporations in Burgundy, Invernois, and other provinces of France, were among the last to emancipate their serfs. See Lalaure: Servitudes Réelles, p. 2. Voltaire: Dict. Philos. v. *Esclaves*.

<sup>2</sup> See Ante, § 112.



but little different from that known under the Roman Empire or differed only by allowing a greater variety in the nature of its burdens, correspondent with the feudal elements of their civil society, which permitted also a recognition, in some degree, of the legal personality of the bondsman.<sup>1</sup> Upon the settlement of those nations in southern Europe, their military system and the distinctions arising from the fact of a conquering race residing among the conquered, made the serfdom adopted, if not introduced by them, an equivalent in its various degrees of oppressiveness for the ancient domestic slavery which had been obliterated with the wealth and power of the previous masters.<sup>2</sup>

After the general conversion of the northern nations of Europe their international intercourse became so modified that, as between Christian nations, prisoners of war could not be reduced to slavery; though captivity and the right to demand ransom, as a consequence of the old law modified by the habits of the Teutonic<sup>3</sup> races, continued to a late period.<sup>4</sup> Feudal servitude being essentially predial, that is, accessory to the soil and con-

<sup>1</sup> That is, among the German nations or tribes, a portion of the people,—the constituents of the nation, were predial servants, annexed to the soil, and the master had not, as a general rule, the power of life and death over them. Tacitus: *Mores Ger.* c. 25. Spelman's *Gloss. voc. Servus*: "Germanorum instar, erant nostri villani a servis multum diversi, quidam erant *prædiales*, quidam *personales*, &c. Among the Gauls, the great body of the people were in a state of vassalage, apparently equivalent to the chattel slavery of the Romans. Cæsar de *Bel. Gal.* L. VI. 13. But besides these legal persons, who were not free, the German nations also traded in slaves as articles of merchandise, selling captives taken in war, and also buying of the nations on the north, and selling in the southern countries of Europe. 1 Hüne's *Darstel.*, pp. 102–107: cites Fischer *Gesch. des deutschen Handels*.

<sup>2</sup> Spence's *Inquiry into the Origin of the Laws, &c., of Modern Europe*, pp. 54, 328. Salic laws in *Canciani Leges Barbarorum*. During the later Imperial period a clear distinction was recognized between predial and domestic slaves; the condition of the former (*coloni*, *inquilini*, *adscriptitii*, or, *adscripti glebæ*) resembling, in many respects, that of the more modern serfs or villeins. See Smith's *Dict. Antiq.*: *Prædium*. In *Novell.* 162, c. 3, Justinian gives the rule by which the children of an *adscriptitia* shall be divided when the father belongs to another estate. In *Novell.* 157, tit. 40, he forbids the separation of families of such predial slaves. See Fletcher's *Studies on Slavery*, p. 327. In the history of the abolition of chattel slavery, the following laws are important. *Imp. Leonis Aug. Nov. Const.* 38. *Ut Imperatoris servi de rebus suis quo modo velint statuere possint.* C. 59. *Abrogatio legis quæ hominem liberum se vendere permittit.*

<sup>3</sup> Heineccius, *Jur. Nat. et Gent.* L. i. c. 1, § 2, n. "Postea mores Germanorum pæne omnibus gentibus communes facti sunt, uti recte observavit Grotius, de *Jure B. et P.* ii. § 1, 2.

<sup>4</sup> Suarez, de *Legibus etc.* L. ii. c. 19. "Sic enim *Jus Gentium*, de servitute captivorum in bello justo, in Ecclesia mutatum est, et inter Christianos id non servatur."

Grotius, *Lib. iii.* c. 7, § 9: "Sed et Christianis in universum placuit, bello inter ipsos orto captos servos non fieri, ita ut vendi possint, ad operas urgeri, et alia pati

ected with a state economy founded on the distribution and tenure of landed estate, gradually acquired the character of a constitution of the particular law of each state (*jus proprium*, or *jus civile* in the same sense) as distinguished from a foundation judicially ascribed to the *law of nations*: and, being susceptible of great variety in the obligations which attached to it, received the legal character of a local distinction of ranks, or of social position, in the institutions of nations composed of individuals of various race, or having distinct historical origin, but not separated by any strongly marked physical distinctions.<sup>1</sup> The subsequent decay of that servitude, which accompanied the progress of Europe in intellectual and moral improvement, needs not to be here particularly considered.<sup>2</sup>

§ 163. While Christianity may be truly said to have contributed greatly to alter the *law of nations*, contained in international and municipal law, by abolishing or modifying slavery as between Europeans, it must be acknowledged that, as it continued for centuries to be received, it also modified that law in introducing a new basis for chattel slavery. At an early period of the present era difference of religious belief was made a ground of distinction in supporting a right to hold slaves. Jews

*que servorum sunt: atque ita hoc saltem, quamquam exiguum est, perfecit reverentia Christianæ legis.*"

Ward's Law of Nations, vol. i. c. 9. Vol. ii. p. 31. Vinnius: Comm. L. i. tit. 3. Gudelin de Jure Novissimo, L. i. c. 4, § 10, and citations.

<sup>1</sup> Sir Francis Palgrave, Hist. of Normandy and England, pp. 31, 32, considers the distinctions of status in mediæval times, commonly called feudal, as being historically derived from the laws of the Roman Empire. And as to predial slavery in Gaul before the Burgundian invasion, see Montesq. Esprit d. Loix, L. 30, c. 10.

The two distinct conditions of chattel slave and of predial bondman or serf must have long existed together in Europe. Down to the commencement of the tenth century, slaves of the northern, and then barbarian and heathen, nations were constantly sold in Germany, France, &c. Hume: vol. i, pp. 107, 113. In the grants of Charlemagne (A. D. 800) "he invariably bestows lands with all the inhabitants, houses, slaves, meadows, moveables and immoveables." In the time of his immediate successors, "a frightful traffic is *secretly* carried on: the nobles, ecclesiastical and secular, making no scruple, when pressed, to sell the children of their serfs." Oxford Chronological Tables. As to the transition from personal to feudal slavery among the Germans and Goths, see Mittermaier's Privatrecht, §§ 47, 49. Vinnius: Lib. i., tit. 3. Bodin's Republic, B i., c. 9. Predial slavery lingered in some of the provinces of France under the laws of *Main-morte* in 1761. (Lalaure; Voltaire; Hallam's Mid. Ages, c. ii., part 2.) Predial serfdom existed in Scotland at the date of the American revolution. See Hugh Miller's My Schools and School-masters, p. 303. Wade's Hist. of Middle and Working Classes, p. 10: abolished by 15 Geo. 3, c. 28.

<sup>2</sup> Ward's Hist. Law of Nations, vol. i, ch. 8, refers to many antiquaries and critics who have thoroughly examined this subject.



and Pagans, living under the dominion of the Christian Emperors, being forbidden to hold Christians in chattel bondage; and afterwards the Papal church prohibited Jews from holding even heathen slaves.<sup>1</sup> It was generally assumed among Christian nations, until a period comparatively recent, that their superiority as possessors of the true faith gave them the right of reducing infidels to slavery irrespectively of the ancient laws of war;<sup>2</sup> while the followers of Mohammed, calling themselves the true believers, have drawn similar conclusions for their own use. The practice of enslaving their prisoners of war was at first mutual between Christian and Mohammedan nations as to each other,<sup>3</sup> and was maintained by the last against the first to a late period; and may be in theory to the present day. The Barbary powers justified their piracies against Europeans upon the pretext of a right sanctioned by religion and ancient international usage; and it was only at the beginning of the present century that they were finally compelled to abandon them after reiterated assertions of the modern international law by Christian powers.<sup>4</sup>

§ 164. Both Christians and Mohammedans long maintained the right to enslave heathens and barbarians. Among the first the act was almost universally supported, if the extension of the Christian faith and civilization were made the professed motive.<sup>5</sup>

<sup>1</sup> Codex, Lib. i., tit. x. Decree of Gregory I. anno 592, that slaves bought by Jews should be set free. Corp. Juris Canonici; Decret. Pars. i. Dist. xiii. Fuero Juzgo, Lib. xii., c. 3, § 12. Fuero Real, Lib. iv. Blair, p. 72. Bishop England's 10th letter, Works, vol. iii., p. 182. Gibbon: vol. ii., p. 274. Gudelin: de Jure Noviss. "Rursum, quamvis Judæis servos habere Christianos non licet, adscriptitios tamen habere permissum est, c. 2, tit. Decret. de Judæis."

<sup>2</sup> Even in Bulls of excommunication issued by the heads of the Roman Church previous to the Reformation it was common to declare the inhabitants of the excommunicated districts liable to be enslaved. See Bull of Gregory XI. against Florentines, 1376; Julius II. against Venetians, 1508; Paul III. against Henry VIII., 1538. See Fletcher: Studies on Slavery, pp. 366-368. Bower: vol. vii., pp. 379-447.

<sup>3</sup> Hume: vol. i., pp. 127, 148. Calvin's case, 7 Coke, 17: "All Infidels are in law perpetui inimici, perpetual enemies (for the law presumes not that they will be converted, that being remota potentia, a Remote Possibility); for between them, as with the Devils whose subjects they be, and the Christian there is a perpetual hostility, and can be no peace; for as the Apostle says, &c. And the Law saith, Judæo Christianum nullum serviat mancipium, nefas enim est, &c. Register, 282."

<sup>4</sup> Sumner's Orations and Speeches, vol. i. Lecture on White Slavery in the Barbary States. Hild. Hist. U. S., vol. v., p. 561; vol. vi., 578.

<sup>5</sup> The tenor of the Papal Bulls, in the years 1480, 1438, 1454, 1458, 1484, according to the author of Letters to Pro-Slavery Men, p. 42, (Boston, 1855,) citing Colonizæ Anglicanæ Illustratæ; by Wm. Bolland, Lond., 1762, Part i., pp. 115-141, is "to ap-

Slavery had existed in Africa from the first acquaintance of Europeans with that continent; <sup>1</sup> but negro slavery, in connection with modern European <sup>2</sup> law, was based on the idea above stated as part of the *law of nations* for Christian powers: that is, the African or Indian slave was held by the European master, as merchandise, by a principle of law then common to all Christian nations, without reference to the villenage of the feudal system; as the slave of the Roman master, of whatever race, had been held by a law common to the then known world.

§ 165. At the time of the planting of the English colonies in America, the laws of war in Europe still retained traces of ancient harshness, and the right of Christian powers to enslave prisoners in war with heathen and infidel nations, was almost universally admitted. In wars between Europeans, the custom of enslaving prisoners of war had ceased, and the claim of private property in the captor, giving a right to demand ransom, which had existed for some time after the amelioration of the ancient law of captivity, was almost universally abandoned.<sup>3</sup> But the slavery of captives of the different creeds was still supported by Christians and Mohammedans against each other.

appropriate the kingdoms, goods and possessions of all infidels or heathen in Africa, or wheresoever found, to reduce their persons to perpetual slavery, or to destroy them from the face of the earth"—"to take any of the Guineans or other negroes, by force or by barter." Gregory XVI. in his Bull against the slave trade in 1840 (see Bishop England's Works, vol. 3, p. 114) cites Bull of Pius II. in 1462 as against the same trade. According to the Bull of Gregory XVI., Paul III., 1587, Urban VIII., 1639, Benedict XIV., 1741, and Pius VII. opposed the slave trade. The author of the letters referred to says that their Bulls were not against the trade in general, or not against the African slave trade.

<sup>1</sup> Banc. Hist. vol. i., 165. Vol. iii., 403. Hane's Darstellung, vol. i., ch. 8. The Romans, in Virgil's time, had negro slaves; a small poem entitled *Moretum*, ascribed to him, contains a description of a negro woman, represented as being the only domestic of a peasant, "*exigui cultor rusticus agri*," v. 31:

"Interdum clamat Cybalen, erat unica custos,  
Afra genus, tota patriam testante figura,  
Torta comam, labroque tumens, et fusca colorem;  
Pectore lata, jacens mamma, compressor alvo,  
Cruribus exilis, spatiosa prodiga planta;  
Continuis rimis calcanea scissae rigeant."

<sup>2</sup> Mackeldey's Compendium Tr. Kaufmann, p. 85, note: "In like manner such precepts [of the Roman law] are inapplicable, which rest upon principles that have never been acknowledged in Germany, or the objects of which do not exist here; e. g. the law applicable to slavery." But slavery is allowed under the Prussian Landrecht, Th. II., tit. 5, § 196, operating as private international law. See Article by the late Mr. Wheaton in *Revue Etrang. et Fran.*, tom. viii., p. 845, and the 6th éd. of his *International Law*, Introd. by W. B. Lawrence, Esq., p. cxxx.

<sup>3</sup> 1 Kent's Comm., p. 14. Bynkershoek: *Quæst. Jur. Pub.*, Lib. I., c. 8.

Moors—the Arabian inhabitants of Africa, were still held as slaves by captivity, in Spain, France, and Italy; and probably many Africans of negro race were held as slaves in Europe under the name of Moors,<sup>1</sup> and their slavery ascribed to the same international usage. Domestic slavery, as part of the system of civil society, still remained, as at the present day, among Mohammedan nations, and the negro tribes of Africa; in which country it is believed to have been for many centuries the condition of a vast majority of the inhabitants.<sup>2</sup> It is probable that long after the ancient chattel slavery of Europe had been replaced by the serfdom of the Middle Ages, negroes had occasionally been brought as articles of commerce to Europe, and retained there as domestic slaves.<sup>3</sup> But it was not until the geographical discoveries of the Portuguese in the fifteenth century, that African slaves, in any considerable number, were made an article of commerce in Europe. The first recorded instance of the importation of African slaves by the Portuguese from the western coast of Africa, illustrates the principles of the *law of nations* exhibited at that time in the international intercourse of Christian nations with Mohammedans, Moors, and heathen negroes of Africa. In the year 1440, Antonio Gonsalez, sent out by Prince Henry of Portugal on a voyage of discovery, attacked a party of wandering Arabs or Moors, and carried off ten or twelve of them captives to Portugal, where, and in the Spanish portion of the peninsula, thousands of the subjects of the extinct Moorish kingdom in Spain were already enduring slavery, as the consequence of their defeat by the Christian princes. Three of these captive Moors, at the command of Prince Henry, and on their promise to pay ransom, were sent back with Gonsalez, on his second voyage to the African coast in 1442; and he received from their kinsmen, in exchange for his prisoners, a ransom consisting of gold dust and ten or twelve negro slaves, as ordinary articles of merchandise.<sup>4</sup> A similar

<sup>1</sup> Hüne, vol. I., pp. 128, 180, 211.

<sup>2</sup> Hüne, vol. I., pp. 148—175.

<sup>3</sup> Bancroft, vol. I., p. 165. Hüne, I., 150—168. Citing Edrisius and Leo Africanus, that accounts of a regular trade in negro slaves exist from about the year 990. Raynal's W. I., tom. 4, p. 48.

<sup>4</sup> Hüne, vol. I., p. 181. 1 Banc., 166, cites Navarete, Introduccion S. XIX., (see 2 Presc. Ferd. and Is., 114,) that Spain anticipated Portugal in introducing negroes

transaction became one of the objects of succeeding voyages. Moors and negroes were carried away, by force, by the Portuguese adventurers, until, after the exploration of the coast had been pushed as far south as the richer and more populous shores of the Gulf of Guinea, it was found safer and more profitable to procure only negroes, by purchase from the native slave merchants.

§ 166. This traffic, in negroes as merchandise, was at this time recognized as legitimate by European governments, without any direct sanction from positive legislation, but rested on the general custom among nations, known both in municipal and international private law,—that custom which, under the name of “the custom of merchants,”—meaning merchants without regard to nationality, was recognized in the English courts as a rule of law. Property in heathen negroes bought in Africa, being then regarded as the effect of *natural law*, so far as it is known in jurisprudence, or as an illustration of the distinction between persons and things, entering into all law, because founded in natural reason. The trade in that property was regarded as founded on existing relations between legal persons in respect to things, which might, like any other branch of commerce, be *regulated* by statute, without a previous act declaring the condition of the negroes who were the objects of those relations and of that commerce. Like many other branches of commerce at that period, it was an object of monopoly; being sometimes granted by the patent of the monarch to companies of discoverers, commercial adventurers, and colonists trading in and between those regions then recently made known, and popularly designated the Eastern and Western Indies. The conversion of infidels being always proposed as a prominent object, and declared to be the justifying motive for the forcible enslavement of barbarians and heathens, whenever contemplated in such enterprises; <sup>1</sup> if not also for the acquisition of purchased slaves. On the discovery of America, the same reasons which upheld the slavery of African Moors and negroes were held to

into Europe. That Sevillian merchants imported slaves from Western Africa,—Irving's *Columbus*, vol. II., p. 851.

<sup>1</sup> 1 Hume, p. 304, cites Benezet, p. 58.

apply to the barbarian inhabitants called Indians; and property in such Indians had the same basis in the *law of nations*; until a distinction was made, between the negro and Indian races, by legislative enactment in the colonies of the several colonizing nations.<sup>1</sup> Those taking effect in the English colonies will hereafter be more particularly referred to.

§ 167. Whatever foundation there may have been in natural reason for slavery, in the opinion of the nations of antiquity, the Roman legislators, or the Asiatic races, there does not appear to have been, in their judgment, any arguments, from the same source, establishing such differences between mankind that some races were liable to that chattel condition, and others naturally exempt.<sup>2</sup> The *law of nations*, in their conception of it, regarded all men as equally capable of becoming property. The modern *law of nations*, as exhibited in the practice of modern European states, must be considered not only to have varied from the ancient rule, in asserting a right of dominion in Christians over infidels, but to have been farther modified, since the geographical discoveries of the fifteenth century, and during the establishment of civilized dominion and municipal law in America, by the introduction of a distinction founded on race or descent, and applied according to physical structure. The capacity for that condition of loss of legal personality, or the liability to become property, being, since that period, confined to the Indian races of America, and African Moors and negroes;

<sup>1</sup> 1 Banc., 167,—that natives from the coast of America were kidnapped by slavers: cites Peter Martyr d'Anghiera, d. vii., c. 1, 2. Hakluyt, v. 404, 405, 407.

The history of the introduction of negroes into Spanish America, and of the influence of Las Casas in effecting it is well known: see Irving's History of Columbus. Robertson's Hist. of Am., and Hist. of Charles V. 1 Banc., ch. 5. 1 Hüne's Darstellung, ch. 8. Herrera is the original authority on these points.

<sup>2</sup> In his speech, 7 March, 1850, Mr. Webster said, Works, vol. V., p. 829,—“The ingenious philosophy of the Greeks found, or sought to find, a justification for it exactly upon the grounds which have been assumed for such a justification in this country: that is, a natural and original difference among the races of mankind, and the inferiority of the black or colored race to the white. The Greeks justified their system of slavery upon that idea precisely. They held the African and some of the Asiatic tribes to be inferior to the white race,” &c. There is nothing to justify this assertion. It appears to be founded on the assumption that those whom the Greeks called *βάρβαροι* were identical with the half-civilized nations of our own time. The Greeks meant by *barbarians* those who were not Greeks: and believed a Greek captive to be a lawful slave to a *barbarian* captor.

in other words, this principle of the *law of nations* became applied as a law *personal* to those races.<sup>1</sup>

§ 168. Slavery of Africans or Indians, whenever thus supported on principles of ancient authority, modified by application to persons of a particular race under the existing *law of nations*,<sup>2</sup> would, apparently, have continued its existence in the issue of those persons, by a principle derived from the same source, that is, the inheritable character of slavery, or that principle by which, the personality of the parent being unrecognized by the law, legal personality was not acquired by the issue; which was considered only as the natural increase of the property, and equally the object of ownership.<sup>3</sup>

But, inasmuch as the heathenism of the enslaved was presupposed to be an essential circumstance and part of that condition of things upon which the *law of nations*, as then received, recognized the chattel condition of the negro or Indian bondman, and the right of property in the European owner, it would be a natural question before any tribunal, within whose jurisdiction such negro or Indian might afterwards be found, whether after his baptism or presumed conversion there was any rule, having the same historical existence, that is, being a *law of nations*, which would still support that condition and right of

<sup>1</sup> It is this personal character of the law of chattel slavery in modern times, which restrains the effect (as an indication of the historical *law of nations*,) of that otherwise general attribution of the right of personal liberty, which, by certain European jurists of the 17th century, herein after cited, is asserted to have had effect in preventing the international recognition of slavery in most European countries at the beginning of that century: see *post*, ch. VII., and notes from Heineccius, Christinæus, &c. The period at which they wrote was precisely that at which the European serfdom had acquired the distinctive character of an institution of the local law (*j. proprium*) of each country, and at which the chattel slavery of heathen and barbarian negroes and Indians, by the *law of nations*, continuing to be applied to them as a personal law, was becoming more frequently recognized in the international law of the commercial and colonizing nations of Europe. This modification of the *law of nations*, at this period, is shown by Bodin, *de Rep.*, [A. D. 1583,] B. I., ch. 5, Knolles' Transl., London, 1606, p. 32,—“and for that the whole world is full of slaves, excepting certain countries in Europe, (which since, by little and little, receive them),” &c.; and in same chapter—“and although servitude, in these latter times, was left off, for about three or four hundred years, yet it is now again approved by the great argument and consent of almost all nations.”

By some writers on the subject of African slavery, and even by some judicial tribunals, it has been held that this personal character of the law of slavery is authoritatively determined by Revelation. In *Neal v. Farmer*, 9 Georgia R., p. 582, it is declared that the slavery of “the issue of Ham,”—meaning of persons of African or negro race, is “an institution of Christianity.” (Italicised in the Report.)

<sup>2</sup> See *ante*, § 58.

<sup>3</sup> See *ante*, § 154.



ownership. The question, it is to be remembered, is not one of a doctrine of the Christian faith or morals, either in the apprehension of the Christian church or of an individual clothed with judicial power, but simply of the existence of a rule having the same historical support as the law by which the slavery of the negro or Indian had first been established; a rule having such support, by the use and practice of nations in their municipal (internal) and international law, that it could be judicially recognized and received as an indication of natural reason. It is a question of the juridical action of nations which have had jurisdiction over negroes and Indians, enslaved while heathens, and afterwards baptized and Christianized.

It would depend, also, upon the juridical action of different nations in respect to this class of natural persons, whether any other or new principles, having a like personal extent as to them, should have the character of universal jurisprudence or the *law of nations*. If generally, wherever Moors, negroes, or Indians were under the legislative (juridical) power of Europeans, only a partial recognition should be made of rights and privileges which, in like circumstances, would be attributed to whites, or men of the European race, there might be a legal attribution of social disability or inferiority, having a juridical origin similar to that liability to chattel slavery which formerly was maintained by the *law of nations*. If no such condition of inferiority should become established by the general practice of nations, the *law of nations* must be held to be the same in respect to all races of men; so that in every jurisdiction, irrespectively of *local* customary law and statutes (*jus proprium*), a person of one of those races would be the subject of legal relations in the same manner as a person of any other race.

§ 169. It would be difficult to discover any general harmony of practice in this respect among civilized nations, at any particular point of time during the period in which the English colonies were founded in America, or at any period since the modern extension of the African slave trade. The slavery of African negroes was certainly continued after their conversion in all the colonies planted by the different European nations. And if reference is made to the practice of Mohammedan states

in analogous circumstances, it does not appear that they ever have recognized the religion of persons held in bondage as determining their condition in respect to the possession of personal liberty, or considered the conversion of a slave, of a different faith, to Islamism, a legal cause of enfranchisement. A difference of creed is viewed only as one of the circumstances which justify the original act of enslavement.<sup>1</sup> It is probable, however, that, with them, adherence to the faith causes a certain recognition of legal personality and capacity for rights;<sup>2</sup> and, from the intimate connection between their civil and religious codes, that it would be unlawful to sell such converted slave to any one who was not of the same faith. In which case such slave would really no longer be treated as a chattel, or an object of property, in the same degree as when unconverted.

The slavery of Christianized Moors and negroes was for a time maintained in some parts of Europe;<sup>3</sup> though it is uncer-

<sup>1</sup> It is commonly thought, that by the Mohammedan law, a slave of another creed is emancipated on conversion to Islamism. But this is incorrect. Hedaya: Hamilton's Translation, Vol. I. p. 420; on manumission. "Ittak, or the emancipation of slaves, is recommended by the prophet, who has declared, 'Whatever Mussulman shall emancipate a slave, (being a believer,) God will, for every member of the slave so emancipated, release a similar member of the emancipated from hell-fire.'" p. 484. "If the slave of an infidel nation, becoming a convert to the faith, retire into the Mussulman territory, he is free; because, when the slaves from the countries around deserted their masters, and came unto, and embraced the doctrines of the prophet, he declared, 'These are the freedmen of God;' and also, because the slave, at the time he delivers himself up, is a Mussulman, and bondage is not established in a Mussulman originally." And see Putnam's Mag., 1855, June, on Slavery in the Ottoman Empire. Mr. Sumner, Orations and Speeches, 12mo, Vol. I. p. 292, note, says: "In point of fact, freedom generally followed conversion; but I do not find any injunction on the subject in the Koran."

<sup>2</sup> Hamilton's Hedaya, Introd., p. 57. "The law in many instances affords them [slaves] protection against injustice, and declares them to be 'claimants of right,'"—and Book 82 and 86 of the same—that slaves or bondmen of various conditions are recognized by the law. *Abids*—absolute slaves, and *Mokatibs*—slaves partially emancipated under some conditions of service or payment. *Mazoons*—slaves licensed to trade. There are slaves transferable and others not.

<sup>3</sup> That enslaved heathens and Mohammedans in Spain and Portugal were not made free on becoming Christianized; Gudelin, de Jure Novissimo, Lib. i., c. 4, 7. "Ac mos est iti servos servos permanere, quamvis religionem Mahumetis ejuraverint, et Christiana imbuantur. Quod absurdum videri non debet, cum sententia sit approbata servitutem personarum et dominicam potestatem legi divinæ non adversari. *Didacus Covar. ad reg. peccatum*, p. 2, § 11. Verum recens est Pii Quinti constitutio exstans ad Petrum Mathæum. In Summa Constitutionum summorum Pontificum captivos fieri liberos, suscepto sacro baptismo, qui sub tutelam civis cujuspiam Romani confugerint." Vinnius: Comm. Lib. i., tit. 8. "Ac mos est (in Lusitania aliisque Hispaniæ partibus) eo quod servum esse non adversaretur legi Divinæ. And Bodin; Repub. Knolles' Trans. pp. 41, 42. Bishop England's tenth letter;—Works, vol. 8, p. 152. Irving's Hist. of Columbus, B. xiv., c. 3;—"It was permitted to carry to the colony [Hispaniola, A. D.



tain whether they were regarded as chattel slaves, or as legal persons held to services, as were the feudal serfs of the same countries. In other European states, the slavery of Moors, negroes, and Indians was never actually recognized. And finally, at some period in the 18th century, no distinction was recognized in Europe between persons of different races *being domiciled or permanent inhabitants*, in respect to the enjoyment of personal liberty. The slavery of Christianized negroes brought over from slaveholding jurisdictions and regarded as aliens, was during the 17th and 18th centuries supported in some instances and in others disallowed.<sup>1</sup>

§ 170. But though it may be difficult to ascertain whether, at any particular period, some one rule or principle has been maintained by a certain number or class of nations, it may be easier to discover whether, in the jurisprudence of any one nation, a recognized legal effect has been judicially ascribed to a rule supposed to prevail among all nations, or to a principle of local origin.

A legal effect must be produced by the application of either municipal (internal) or international law. In examining the municipal (internal) law of any one state with reference to the present subject of inquiry, it is to be noticed that though such converted slaves may not have been set at liberty, enfranchised, or put on an equal footing with the other subjects of such dominion in respect to the enjoyment of personal liberty, yet if their condition was recognized as an incident of a relation between legal persons, consisting of correlative rights and obligations, (like that of the feudal serf, or of the Mohammedan slave in Mohammedan countries, according to the view above taken of his condition,) that condition of bondage could no longer be regarded in the jurisprudence of that nation, or of any other, as the effect of a *law of nations*—universal jurisprudence, or of natural reason as shown by that law. Because, as has been

1501] negro slaves born among Christians; (cites Herrera, Hist. Ind. decad. 1, Lib. iv., c. 12) that is to say, slaves born in Seville and other parts of Spain, the children and descendants of natives brought from the Atlantic coast of Africa, where such traffic had for some time been carried on by the Spaniards and Portuguese."

<sup>1</sup> The authorities showing this will be presented in a chapter treating of the private international law in connection with slavery during the colonial period.

shown in § 112, it is chattel slavery alone that can be the same *status* in different countries, and the servile condition of a legal person varies in different countries, according to the nature of the correlative rights and obligations, in respect to other persons, and in respect to things, which may be attributed to the master and bondman. The condition of such person, in whatever obligations it might consist, would indeed have been regarded as agreeable to natural reason in the view of all tribunals acting under the state establishing that condition; because all the laws of a state are promulgated as jural laws, and received in its own jurisdiction as consistent with natural reason. But it would no longer have been taken to be a condition proved to be jural from the general reasoning of mankind.

And if, in any countries wherein negroes or Indians were legally held as slaves, notwithstanding their conversion to Christianity, such slavery had been specially supported by positive legislation, it would therein be more doubtful whether that continued slavery could have been, in such countries, judicially attributed to universal jurisprudence.

But according to what has been said on this point in the elementary examination of the subject, given in the second chapter, a doctrine of this character is properly distinguishable only in the judicial application of private international law.<sup>1</sup>

The slavery of Christianized negroes, Moors, or Indians might have been continued in one or more countries of which they were domiciled inhabitants, and it may not be easy to discriminate whether it was therein judicially attributed to a principle of universal jurisprudence, or to some law of national origin (statute or local custom), being a *jus proprium* as distinguished from a *jus gentium*. But where the question may have occurred under the private international law, as where a Christianized negro, &c., had been brought into the forum of jurisdiction from some foreign country, wherein he had been (it was admitted) lawfully held in slavery, and the question was of the *continuance*<sup>2</sup> of that condition, it would become necessary for the tribunal to decide whether it was supported in the forum by force of the *law of nations*, or whether its continuance would

<sup>1</sup> See *ante*, §§ 94, 101.

<sup>2</sup> See *ante*, § 68.

depend on statute and local precedent, including the so-called rule of *comity*, the nature and limits of which have also been examined in the second chapter.<sup>1</sup>

§ 171. It seems probable that, in the first instances of an inquiry as to the legal condition of a Christianized Moor, negro, or Indian, judicial tribunals would have referred to the former legislative (juridical) action of European states in reference to the slavery of whites, or persons born in Europe. For, as has been shown, the slavery of infidels and heathen negroes and Indians was of the same origin; that is, was ascribed to principles traceable in the history of jurisprudence as part of the customary law of the civilized world. In tracing the decay of that chattel slavery which, without any distinction of race or physical structure, had been an element of civil society under the Roman Empire, it was shown, that though the civil power did not immediately determine the legal rights and obligations of natural persons according to religious belief, and though as a general rule, the slave did not obtain personal liberty, yet the distinct attribution of legal personality and capacity for rights, while yet in a servile condition, became universal; while at the same time that condition became judicially attributable to the law of some one state only, or to some *jus proprium*, and was no longer a *status* equally recognized in municipal (internal) and in international law.<sup>2</sup> By reverting thus to the ancient doctrines of European jurisprudence it might perhaps have been held, and consistently with the limits of the judicial function, not, indeed, that the baptized or converted slave acquired freedom, but that his condition of servitude was referable only to the juridical action of some one state; and that, if lawful in the place of his domicil, it could no longer be internationally recognized as if still attributed to the *law of nations*.

§ 172. From this it appears that, admitting that the slavery of Africans, Moors and Indians could not be supported in England or the colonies under the law of villenage,<sup>3</sup> it would be a question which might be differently answered at different periods between the first planting of the English colonies in America and the end of the 18th century, whether the *law of nations*, en-

<sup>1</sup> See *ante*, §§ 110, 113, 114.

<sup>2</sup> See *ante*, §§ 160-162.

<sup>3</sup> See *ante* § 141.

tering into the common law of England as a judicially received indication of natural reason, could be held to support the slavery of Christianized Moors, negroes or Indians, considered either as a chattel condition or as a relation between legal persons.

§ 173. While the general principle is fully relied on, that the ordinary juridical usage of other nations is properly referred to by the tribunals of any one state or nation, administering private law as the will of the state, it is always at the same time remembered that each nation or political possessor of sovereign power is, in its estimate of the requirements of natural reason, entirely independent of the opinion of other similar states or persons. And, besides, such is the development of the *law of nations*, that, as has in this chapter been illustrated in the history of the Roman law, and as has been explained in the second chapter, the *law of nations* must, in any state wherein laws have long been administered, be supposed to have been already applied as part of the customary law of that state.<sup>1</sup> It is hardly possible to conceive the jurists or the judicial officers of such a state as deriving a rule of action simply from the practice of foreign states, and without making a juristical reference to some act of legislation, or precedent of local authority, indicating the fact that such *law of nations* is already part and parcel of the law of the land. Especially, since it is to be remembered that the *law of nations* is mutable;<sup>2</sup> that it changes by the several action of different nations, acting independently of each other, it becomes the duty of the historical jurist, and of the judicial tribunal, rather to look for a part of their national common law as being the state's conception of universal jurisprudence, than to determine what is the doctrine, on any one point, most commonly received by certain nations whom the state has recognized as juridical guides.

§ 174. Each sovereign state or nation is in like manner independent of every earthly power in the acceptation and enforcement of any rule which may be attributed to Christianity. Though some principles juridically applied by European nations may be attributed to, or have been historically derived from,

<sup>1</sup> *Ante* §§ 94-97.

<sup>2</sup> *Ante* § 89.

the Christian code of morals, their legal authority must depend upon their adoption by each several state or nation as a rule of action, and is not simply asserted by its judicial tribunals on their own recognition or perception of that religion. Though it is sometimes said that Christianity is part of the common law of England,<sup>1</sup> yet, what rules of moral conduct are to be taken to have the effect of law can, by a tribunal be ascertained only according to some known judicial criterion. It is not what the judge shall consider a requirement of Christianity, nor even what some church may promulgate as a Christian rule of duty, but only what the state may have acknowledged for such. The maxim, that Christianity forms part of the common law, is now (that is, at a period when the law of England has so long existed as a customary law) of little or no juridical force. Indeed when, at any period of the Christian era, Christianity is judicially referred to as an indication of the rules of natural reason which may be enforced as law, on a presumption that it is the will of the state to make it a coercive rule of action, it cannot be distinguished from the *law of nations* of that period: that is, from those principles which all Christian nations (*gentes moratiores*)<sup>2</sup> have agreed in sustaining with the force of positive law. Otherwise it must be identified with the conscience of the tribunal, or the exposition of some church or body of Christians.<sup>3</sup>

§ 175. But whatever may have been the principles, affecting the freedom of natural persons, which in the judgment of the supreme power of the state were attributable to Christianity, it cannot be supposed that if that supreme power gave effect in one part of its dominions to any one coercive rule, as a consequence of that doctrine, it should make a contrary rule to be

<sup>1</sup> Milton in his *Defensio pro Populo Anglicano*, p. 103, says that "by the laws of Edward the Confessor, it was a fundamental maxim of our law, which I have formerly mentioned, by which nothing is to be accounted a law that is contrary to the laws of God, or Reason." The so-called laws of Edward the Confessor are probably only a traditional view of the common law of his time; see Hale's *Hist. of Com. L.*, by Remington, p. 5, n. B. Noy's *Maxims*, 13,—"Four lessons to be observed where contrary laws come in question. 1. The inferior law must give place to the superior. 2. The law general must yield to the law special. 3. Man's laws to God's laws. 4. An old law to a new law." The recognition of the law of God as supreme is made in every system of law. But if the state is the expositor?—see ante §§ 14–16. The legality of slavery in England before the Norman conquest has been noted ante § 143, and the doctrine of *Neal v. Farmer*, § 167, n.

<sup>2</sup> Ante p. 83, note.

<sup>3</sup> Ante § 101 and note.

law in another part. It does not follow that, if the supreme legislative power in the British Empire sanctioned slavery in one part of its dominions, it could not, or did not, prohibit it in another. But it must be presumed that, if it was sustained in any one part, it could not be judicially considered illegal in the other, on the ground of being contrary to the view of Christian morality sustained by the state. If Christianity is to be held part of the common law of England, a sanction given to the slavery of Africans or negroes, in any part of the world, is a proof that the state did not at that time regard such slavery as contrary to Christianity, or as being *for that reason* forbidden by the common law.<sup>1</sup>

The question in this point of view is, not so much whether chattel slavery was maintainable under the local customary law of England; or whether it was maintained by statute law, either in England or in the colonies, or in both: but whether it was recognized at all, and held to be any where consistent with the moral code of a Christian nation.

§ 176. The recognition of principles having the character of universal jurisprudence or a *law of nations*, as has been shown in the second chapter, is most distinctly made in the judicial enunciation of private international law: that is, where the customary or unwritten law of the country is applied to determine the rights and obligations of private persons, in those interests and actions which are beyond the control of single states,<sup>2</sup> or where persons are recognized as sustaining rights and obligations in relations which have become existent under the juridical and legislative power of some foreign state.<sup>3</sup>

The English judicial decisions which have this international bearing, in connection with African slavery, will be noticed hereafter.

But the recognition by the state of a principle, as part of

<sup>1</sup> Mr. Hildreth, (Hist. U. S. vol. 2, p. 427,) commenting on juristical opinions in England, 1729–1750, respecting the maintenance of slavery in England, says, “to avoid overturning slavery in the colonies, it was absolutely necessary to uphold it in England.” This is not correct: though, if slavery had been repudiated in England on the ground that it was contrary to Christianity, or the law of God, it would have been necessary to infer that it was illegal in the colonies; that is, if *the law of England and the law of the colony proceeded from the same political source.*

<sup>2</sup> *Ante*, § 10.

<sup>3</sup> *Ante*, § 68.

the *law of nations*, may be shown from statutory enactments. And since the meaning of language is a thing of custom, and known by reference to existing facts, the words of a statute may indicate the *law of nations*, on some point, as received by the state. Especially is this true of legislation in reference to matters of private international law, or matters which imply a recognition of other jurisdictions and sources of law. And this applies both to the action of the legislative and the judicial source of law. The use of terms having a definite meaning in the usage and practice of merchants, which is a particular branch of the private international law,<sup>1</sup> may be equal to a recognition of that usage and practice as universally allowed, or as a *law of nations*, especially when the statutes are intended to operate on the intercourse of persons subject to different political sovereigns. When a statute of 1697, 8, 9, and 10, Wm. 3, c. 26, entitled "An Act to settle the trade to Africa," commences—"Whereas the trade to Africa is highly beneficial and advantageous to this kingdom, and to the plantations and colonies thereunto belonging,"—the nature of that "trade" must be explained from the previous history of commerce, and in accordance with the "custom of merchants" at that time. And when in the statute "negroes" are spoken of as the objects of that trade, the extent of the term *negroes* and the legal nature of their condition, then spoken of as objects of a commercial enterprise, must be explained by the *law of nations* then acknowledged in mercantile affairs. And it is not to be inferred that, before this act should make slavery lawful under British jurisdiction, provision must have been made by statute, placing the "negroes" in the condition of chattels or of persons under involuntary servitude. A historian must describe such an act as a law declaring the *slave* trade highly beneficial and advantageous to the kingdom and its colonies.<sup>2</sup>

<sup>1</sup> That the *law merchant* is recognized as part of the common law of England, see Co. Litt., 2 Inst., c. 80.

<sup>2</sup> See 3 Banc., p. 414; and compare Lysander Spooner, on the Unconstitutionality of Slavery, p. 25. It may be admitted that, when the "trade to Africa" was first mentioned in English public Acts, no reference was had to slaves as articles of that trade. The association of the slave trade with that branch of English commerce was gradually formed between the reign of Elizabeth and 1662, when Charles II. incorporated a third African, or Guinea, company which undertook to supply the British



Treaties are as much juridical acts on the part of the state or sovereign as are ordinary statutes; though the objects immediately contemplated may be beyond the realm. They may create rights and obligations which the national courts will enforce. The twelfth article of the Treaty of Utrecht, July 13, 1713, between Great Britain and Spain, granted "to her Britannic Majesty and to the company of her subjects established for that purpose, as well the subjects of Spain as all others being excluded, the contract for introducing negroes into the several parts of the dominions of his Catholic Majesty in America (commonly called El Pacto del Assiento de Negros), for the space of thirty years." And the same section grants the occupancy of lands near the Rio de la Plata, "suitable for maintaining the servants of the said company and their negroes (nigritas), and for safely keeping them, the said negroes, for the purpose of being sold."<sup>1</sup>

An Act, 1749–1750, 23 Geo. 2, c. 31, entitled, "An Act for extending and improving the trade to Africa," which begins, "Whereas the trade to Africa is very advantageous to Great Britain, and necessary for supplying the plantations and colonies, thereunto belonging, with a sufficient number of negroes at reasonable rates," &c., must be taken to mean that the negro slaves brought or "supplied," were to be *sold* at reasonable rates.<sup>2</sup> The sale and disposal of negroes as articles of merchandise is also referred to as one of the objects of the trade in sec. 20 of the Act of 1697, wherein "governors, deputy-governors, and judges are forbidden under penalty to act as a factor or factors, agent or agents, for the said company, or any other person or persons, for the sale or disposal of any negroes." And the lawfulness of chattel slavery, of negroes bought as articles of commerce on the coast of Africa, is not the less contemplated, by the Act of 1749–50, because in the twenty-ninth section it is enacted—"that no commander or master of any

West Indies with 3,000 negroes annually. See 1 Hüne, p. 297—311. 2 Anderson's Hist. Com., p. 627.

<sup>1</sup> Dumont's Corps Diplomatique, Tom. viii., p. 395, and Wheaton's L. of Nations, p. 586; refers Dumont, Tom. viii., 2 me. partie, p. 844.

<sup>2</sup> "When [about 1750] the exclusive privileges of the Royal African Company expired, the English government undertook to maintain, at their own expense, the forts and factories on the African coast, and the trade was thrown open." 2 Hild. 427.

ship trading to Africa, shall by fraud, force, or violence, or by any other indirect practice whatsoever, take on board, or carry away from the coast of Africa any negro or native of said country, or commit, or suffer to be committed, any violence on the natives to the prejudice of the said trade ;” and a forfeiture for such action is declared. For though, in the earliest period of the intercourse of Europeans, the English included, with the African tribes, negroes were kidnapped or piratically seized by force, and the practice had perhaps at first been considered lawful by the *law of nations*, the common opinion of Europeans, long before the date of this statute, had been changed, and a distinction made between the legal slavery of negroes bought on the coast from African slave-merchants, and the condition of such stolen captives.<sup>1</sup>

§ 177. From the sanctioning a trade in negroes, as articles of merchandise, under the British flag, without limiting the trade to any part of the imperial dominions, it would be a just inference that the possession of such property would be lawful in England. The entry of such property into England is contemplated in the first of the above acts, sec. 7, where the duties are specified “ which shall be paid at the place of importation upon all goods and merchandise (negroes excepted) imported in (into) England, or any of his majesty’s plantations or colonies in America from the coast of Africa ; \* \* \* and that all goods and merchandise (negroes excepted) that shall be laden or put on board any ship or vessel on the coast of Africa, between Cape Blanco and Cape Mount, and shall be imported into England, or into any of his majesty’s plantations or colonies aforesaid, shall answer and pay the duties aforesaid,” &c.

<sup>1</sup> Wheaton : Internat. L., p. 24, and Law of Nations, p. 35, cites Soto de Justitia et Jure (A. D. 1568), Lib. iv., Quæst. ii., art. 2 : “ If the report which has lately prevailed be true, that Portuguese traders entice the wretched natives of Africa to the coast by amusements and presents and every species of seduction and fraud, and compel them to embark on their ships as slaves, neither those who have taken them, nor those who buy them from the takers, nor those who possess, can have safe consciences, until they manumit these slaves, however unable they may be to pay ransom.” This is indeed only the opinion of a private man,—his moral judgment of what is right ; but the frequency with which it has been cited by jurists gives it the character of an exponent of the juridical intention of European states.

For other illustrations of this distinction, see 1 Hüne, p. 300, cites Asthley’s Collection, I, 160. Post, ch. VI., Massachusetts, 1645. 3 Har. & McHen. R., 501, and Wheeler’s Law of Slavery, p. 11.

§ 178. When any natural person had been brought within some European territorial jurisdiction, as a slave, it would be a question,—what was the nature of the right claimed in respect to him, and what persons could be held as slaves,—whether heathen Africans, Moors, or Indians only, or any other and what races of men? The question might be raised, whether the property was still in the person of the negro, &c., or in the right to his service? The question would be of the nature, operation, and personal extent of that *law of nations* under which he had been introduced into the jurisdiction. If his slavery were sustained by that law while a heathen, it would then be a question whether, after conversion, or baptism, his condition was determined by that law, either to be that of a chattel or of a bondsman. And if no principle of the *law of nations*, as then received, determined his condition, it would be then a question whether any law judicially known as one of national origin (*jus proprium*, § 152) subjected him to the condition of servitude.

§ 179. The recognition of a principle of the *law of nations*, under the juridical power of some one state or nation, is made in the application of either municipal (internal) or international private law; according to the character of the persons whose relations are to be determined; that is, according as they are regarded simply as the domiciled inhabitants of the jurisdiction, without regard to the existence of other jurisdictions, or as persons anteriorly subject to the juridical power of some other state.

Assuming, then, that the only natural persons who could be property, or could be held in involuntary servitude, by the operation of universal jurisprudence—the *law of nations*—were negroes, Moors, or Indians, and that there were none such in England, before the modern extension of the African slave trade during the period in which the colonies were planted in America,<sup>1</sup>—the question of the legality of the slavery of a person of that description, under the territorial jurisdiction of the law of

<sup>1</sup> Barrington on Statutes, time of 1 Rich. II.,—a chapter to be noted in connection with villenage, as well as chattel slavery—cites Hakluyt, that in the year 1558, four and twenty negroes were brought into England from the coast of Africa.

England, would be, in the first instance, a question of the private international law—the law determining the relations of persons entering the country as alien to its jurisdiction. For, whether the negro, Moor, or Indian were brought into the realm by an alien or by a domiciled owner, the claim of that owner would be a question of that character, either by the recognition of the alien character of the slave, or by the assertion of the legal continuance of a former *status* or condition resulting from anterior subjection to the law of a foreign jurisdiction;<sup>1</sup> presenting a question of the so-called “conflict of laws,” and the effect of *comity* as a rule to guide judicial tribunals. But since a natural person who had been a slave in a foreign jurisdiction could have no proper domicil, distinct from that of his master or owner, or would have a domicil only according to the intention of the owner, the question of the condition of such a person in England would belong to the international law, or to the municipal (internal) law, according to the purpose of the owner, either to remove him to the foreign jurisdiction in which he had been held in slavery, or to maintain his custody and control, in England, as the right of a domiciled inhabitant.<sup>2</sup>

The question, as presented under the first alternative, will be considered in another chapter. But in the other case, where the question would be of the continued servitude of such negro, Moor, or Indian, under the local or territorial law of England, (if his *status* or condition was to be determined independently of any statute, that is, by the customary or common law alone,) it would still be necessary to determine—whether the *law of nations*, historically known, was to be applied as part of that common law, acting as a personal law on the condition of a certain class of natural persons;<sup>3</sup>—whether that law continued the same; and whether it was prevented from having any force by reason of the extent of rules of local or national origin (*jus proprium*) having contrary effect upon the individual and relative rights of private persons.<sup>4</sup>

§ 180. The question of the possible existence of involuntary servitude under the law of England, seems to have been from

<sup>1</sup> See *ante*, § 68, the note, and § 69.

<sup>2</sup> See *ante*, § 111.

<sup>3</sup> Comp. *ante*, § 121.

<sup>4</sup> See *ante*, § 144.

time to time a subject of judicial inquiry during the period referred to. In the year 1640, when the impeachment of the judges of the Star-chamber by the House of Commons, in behalf of John Lilburne, went up to the House of Peers, "it was urged by those that managed the same, that in the eleventh of Elizabeth one Cartwright brought a slave from Russia, and would scourge him, for which he was questioned; and it was resolved that England was too pure an air for slaves to breathe in."<sup>1</sup>

Barrington, on the Statutes, 5th ed. p. 313, in referring to this<sup>2</sup> remarks, that the word *slave* is used in 1 Edw. VI. c. 3, where it is enacted that a vagabond and idle servant shall become a *slave* to his master. But the 3-4 Edw. VI., c. 6, expressly repeals so much of that act "as tendeth to make vagabonds slaves." (1 Bla. Comm. 424. Keble's Statutes.)

§ 181. The question of the lawfulness of the slavery of negroes in England was frequently, after this date, discussed before the courts. The reports are meagre in stating the arguments upon which they were decided. The earliest of these occurred in 1677, 29 Car. II. in *B. R. Butts vs. Penny*, which in 2 Levinz, 201, is reported as follows.

<sup>1</sup> 2 Rushworth, 468. Considering the time at which W. Harrison wrote, 1577—an author published in Holinshed, his statements may be here cited, though his style does not inspire much confidence. He says: Hol. Chronicles, Vol. I. 168, "As for slaves and bondmen we have none, naie such is the privilege of our countrie by the especial grace of God, and bountie of our princes, that if anie come hither from other realms, so soone as they set foot on land they become so free of condition as their masters; whereby all note of servile bondage is utterlie removed from them, wherein we resemble (not the Germans, who had slaves also, though such as in respect of the slaves of other countries might well be reputed free, but) the old Indians and the Taprobanes, who supposed it a great injurie to nature to make or suffer them to be bond whom she in her wonted course doth product and bring forth free."

The author introduces this in a description of the laboring class, of whom he says: "This fourth and last sort of people, therefore, have neither voice nor authority in the commonwealth, but are to be ruled, and not to rule other," &c.

<sup>2</sup> This passage in Rushworth seems to be the original authority for this celebrated dictum. Barrington, in the place cited, attributes the saying to Lilburne. He also refers to Fitzherbert, as saying with regard to villein "tenures in the same reign, that a notion, originally inculcated by Wickliff and his followers, began to prevail, of its being contrary to the principles of the Christian religion that any one should be a slave; and hence, in more modern times, slavery hath been supposed to be inconsistent with the common law, which is said to be founded upon Christianity;" and adds, "Be the law as it may, the persuasion contributed greatly to the abolishing villenage; and the principle, whether adopted by the common law from Christianity, or otherwise, cannot be too much commended or insisted upon. I cannot, however, but think, that neither the Christian religion, nor the common law, ever inculcated such a tenet."

“TROVER for 100 *Negroes*, and upon *Non Culp.* it was found by special Verdict, that the *Negroes* were Infidels, and the *Subjects of an Infidel Prince*, and are usually bought and sold in *America* as Merchandise, by the Custom of Merchants, and that the Plaintiff bought these, and was in possession of them until the Defendant took them. And *Thompson* argued there could be no Property in the Person of a Man sufficient to maintain *Trover*, and cited Co. Lit. 116.<sup>1</sup> That no Property could be in Villains but by Compact or Conquest. But the Court held, that *Negroes* being usually bought and sold among Merchants, as Merchandise, and also being Infidels, there might be a property in them sufficient to maintain *Trover*, and gave Judgment for the Plaintiff, *nisi Causa*, this Term; and at the end of the Term, upon the Prayer of the *Attorney-General* to be heard as to this Matter, Day was given until next Term.”

The same case is reported in 3 Keble, 785, thus:

“Special Verdict in Trover of 10 *Negroes* and a half find them usually bought and sold in *India*, and if this were sufficient property on (for) Conversion, was the question. And Thomson, on 1 *Inst.* 116, for the Defendant, said here could be no property in the Plaintiff more than in Villains; but *per Curiam*, they are by usage *tanquam bona*, and go to Administrator until they become Christians; and thereby they are Infranchised: And Judgment for the Plaintiff, *Nisi*, and it lieth of moety or third part against any Stranger, albeit not against the other Copartners.”<sup>2</sup>

§ 182. In the case *Chambers vs. Warkhouse*, in the year 1693, 4 Will. and Mary, which was in trover for dog-whelps, the question was whether they could be property, and it was said by the court, “Trover lies of Musk-Cats and of Monkeys, because they are Merchandise; and for the same Reason *it has*

<sup>1</sup> Where villenage is described.

<sup>2</sup> 20 Howell's State Tr. 52. Mr. Hargrave said in his argument, that the Roll of this case had been examined for him by a friend, “and according to the account of it given to me, though the declaration is for negroes generally in London, without any mention of foreign parts, yet from the special verdict it appears that the action was really brought to recover the value of negroes, of which the plaintiff had been possessed, not in England, but in India. Therefore, this case would prove nothing in favor of slavery in England, even if it had received the Court's judgment, which, however, it never did receive, there being only an ‘*ulterius consilium*’ on the Roll.”

was adjudged, that *Trover* lies of *Negroes*." This is cited in the subsequent cases.

§ 183. The case of *Gelly vs. Cleve* is spoken of in 1 *Ld. Raymond*, 147, as occurring in 1694; as follows:

"Hill. 5 Will. & Mar. C. B. between *Gelly* and *Cleve*, adjudged that *trover* will lie for a *Negro* boy; for they are heathens, and therefore a man may have property in them, and that the court, without averment made, will take notice that they are heathens. *Ex relatione m'ri Place*."

§ 184. The case in 1 *Ld. Raymond*, 147, is that of *Chamberlayne vs. Harvey*, 8 & 9 Will. 3, 1697, which is there given as follows:

Trespass for taking of a *Negro pretii* 100*l*. The jury find a special verdict; that the father of the plaintiff was possessed of this *Negro*, and of such a manor in *Barbadoes*, and that there is a law in that country, which makes the *Negro* part of the real estate; that the father died seized, whereby the manor descended to the plaintiff as son and heir, and that he endowed his mother of this *Negro* and of a third part of the manor: that the mother married *Watkins* who brought the *Negro* into *England*, where he was baptized without the knowledge of the mother; that *Watkins* and his wife are dead, and that the *Negro* continued several years in *England*; that the defendant seized him, &c. And after argument at the bar several times by Sir *Bartholomew Shower* of the one side, and Mr. *Dee* of the other, this term it was adjudged that this action will not lie. Trespass will lie for taking of an apprentice, or *hæredem apparentem*. An abbot might maintain trespass for his monk; and any man may maintain trespass for another, if he declares with a *per quod servitium amisit*; but it will not lie in this case. And *per Holt* chief justice,<sup>1</sup> *trover* will not lie for a *Negro*, *contra* to 3 *Keble* 785, 2 *Lev.* 201, *Butts vs. Penny*." Then follows the reporter's reference to *Gelly vs. Cleve*, as above given.

The report of the same case in *Carthew's R.* 396, is,

"*Trespass, &c.*, for that the Defendant *vi & armis unum*

<sup>1</sup> *Burge*, Vol. I. p. 736, gives as the report of the Judges upon the memorial of the African Company touching the Assiento, in 1689—"In pursuance of his Majesty's order in Council hereunto annexed, we do humbly certify our opinions to be that negroes are merchandise," &c. Signed by J. Holt and others.



*Æthiopem (Anglice vocat') a Negro ipsius querentis pretii 100l. apud London,' &c.* took and carried away and kept the Plaintiff out of Possession of the said *Negro* from that Time *usque diem exhibitionis Billæ prædict' per quod* he (the Plaintiff) lost the Use of his said *Negro*.

“Upon not guilty pleaded, the Jury gave a special Verdict, the substance whereof was as followeth :

“*ss.* They find that the *Negro* had been baptized after the Taking, &c. and the matter was argued upon that Point, (*viz.*) Whether the Baptism *was a Manumission, and as to that the Court gave no opinion.*

“*Sed per Curiam,* An Action of Trespass will not lie, because a *Negro* cannot be demanded as a chattel, neither can his Price be recovered in Damages in an Action of Trespass, as in case of a Chattel ; for he is no other than a *slavish Servant*, and the master can maintain no other Action of Trespass for taking his Servant, but only such which concludes *per quod servitium amisit*, in which the master shall recover for the Loss of his Service and not for the Value, or for any damages done to the Servant.

“Judgment *quod querens nil capiat per Billam.*” The pleadings and special verdict in this case are given in the third volume of *Ld. Raymond*, p. 129.<sup>1</sup>

§ 185. In the year 1705, occurred the cases of *Smith vs. Brown and Cooper*, and *Smith vs. Gould*, the first of which is reported in 2 *Salkeld* 666 and *Holt's R.* 495. The report as in *Salkeld* is,

“The plaintiff declared in *indebitatus assumpsit* for 20*l.* for a negro sold by the plaintiff to the defendant, *viz.* in parochia beatæ Mariæ de Arcubus in warda de Cheape, and verdict for the plaintiff ; and on motion in arrest of judgment, *Holt*, C. J. held, that as soon as a negro comes into *England*, he becomes free. One may be a villein in *England*, but not a slave. *Et per Powell*, J. In a villein the owner has a property, but it is an inheritance ; in a ward he has a property, but it is a chattel real ; the law took no notice of a negro. *Holt*, C. J. You

<sup>1</sup> The arguments of counsel, which will be found interesting, are given in the report of the same case, 5 *Mod. R.* 187.

should have averred in the declaration, that the sale was in *Virginia*, and, by the laws of that country, negroes are saleable; for the laws of *England* do not extend to *Virginia*, being a conquered country, their law is what the king pleases; and we cannot take notice of it but as set forth; therefore he directed the plaintiff should amend, and the declaration should be made, that the defendant was indebted to the plaintiff for a negro sold here at *London*, but that the said negro at the time of sale was in *Virginia*, and that negroes by the laws and statutes of *Virginia*, are saleable as chattels. Then the attorney-general coming in said they were inheritances, and transferable by deed, and not without; and nothing was done."

The report of this case in Holt's R. 495, is,

"In an *Indebitatus Assumpsit* the Plaintiff declared for 20*l.* for a negro sold to the Defendant, in the Parish of the Blessed *Mary of the Arches* in the Ward of Cheap: There was a Verdict for the Plaintiff, and Motion in arrest of Judgment.

"*Holt, C. J.* As soon as a Negro comes into *England* he becomes free; and one may be a villein in *England*; but not a slave: You should have averred in the Declaration that the sale of the Negro was in *Virginia*, and by the laws of that country Negroes are saleable; for the laws of *England* do not extend to *Virginia*, and we cannot take notice of their Law but as set forth: Therefore he ordered the Plaintiff should amend and alter his Declaration, that the Defendant was indebted to him so much for a negro sold here at *London*, but that the said negro at the time of the sale was in *Virginia*; and that negroes by the Laws and Statutes of *Virginia* may be sold as chattels.

"*Powel, J.* In a Villein the Owner has a Property, but 'tis an Inheritance; the law takes no notice of a Negro."

The action in this case appears to have been for money on sale of a negro, being in *Virginia*, where it was admitted slavery was lawful. But the court on the pleadings held itself bound to suppose that the transaction was in *England*, and, so viewing it, held the contract without consideration, as for the purchase of what could not be an article of commerce by the law of *England*.<sup>1</sup>

<sup>1</sup> Lord Mansfield said in *Somerset's case*, Loft's R. 17: "Contract for sale of a slave

The case of *Smith vs. Gould* is also reported in 2 Salkeld, 666, and is also in 2 Ld. Raymond, 1274. The report in Salkeld is mostly of the argument for the owner, which was made by the reporter as counsel. In Ld. Raymond it is: "In an action of trover for a *negro*, and several goods, the defendant let judgment go by default and the writ of inquiry of damages was executed before the lord chief justice *Holt* at *Guildhall* in *London*. Upon which the jury gave several damages, as to the goods, and the *negro*; and a motion as to the *negro* was made in arrest of judgment, that trover could not lie for it, because one could not have such a property in another as to maintain this action. Mr. *Salkeld* for the plaintiff argued, that a *negro* was a chattel by the law of the plantations, and therefore *trover* would lie for him; that by the *Levitical* law the master had power to kill his slave, and in *Exodus* xx. ver. 21, it is said, he is but the master's money; that if a lord confines his villein, this court cannot set him at liberty: *Fitz. Villain* 5, and he relied on the case of *Butts* and *Penny*, 2 Lev. 201, 3 Keb. 785, as in point, where it was held, *trover* would lie for *negroes*. *Sed non allocatur*. For *per totam curiam* this action does not lie for a *negro*, no more than for any other man; for the common law takes no notice of *negroes* being different from other men. By the common law no man can have a property in another, but in special cases, as in a villein, but even in him not to kill him: so in captives took in war, but the taker cannot kill them, but may sell them to ransom them: there is no such thing as a slave by the law of *England*. And if a man's servant is took from him, the master cannot maintain an action for taking him, unless it is laid *per quod servitium amisit*. If *A.* takes *B.* a *Frenchman* captive in war, *A.* cannot maintain an action, *quare cepit B. captivum suum Gallicum*. And the court denied the opinion in the case of *Butts* and *Penny*, and therefore judgment was given for the plaintiff, for all but the *negro*, and as to the damages for him, *quod querens nil capiat per billam*."

In Salkeld the court is made to speak somewhat differently as to an action for taking away a captive; saying that *trespass*

is good here; the sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement."

might lie, though not *trover*. "*Sed Curia contra*. Men may be the owners, and therefore cannot be the subject of property. Villenage arose from captivity, and a man may have trespass *quare captivum suum cepit*,<sup>1</sup> but cannot have *trover de gallico suo*. And the court seemed to think that in trespass *quare captivum suum cepit*, the plaintiff might give in evidence that the party was his negro, and he bought him."

§ 186. The decision in *Pearne v. Lisle*, 1749, Ambler's R. 75, was on motion before the Chancellor to discharge a *ne exeat regno*, the plaintiff's claim being founded on the hire for certain negroes then held by the defendant in Antigua. The writ was discharged on the ground that it was a legal demand for which the defendant might be arrested at law, but the Chancellor (York<sup>e</sup>) Lord Hardwicke, said:

"As to the nature of the demand. It is for the use of Negroes. A man may hire the servant of another, whether he be a slave or not, and will be bound to satisfy the master for the use of him. I have no doubt *trover* will lie for a Negro slave; it is as much property as any other thing. The case in Salk. 666, was determined on the want of proper description.<sup>2</sup> It was *trover pro uno Ethiope vocat. Negro*, without saying slave; and the being Negro did not necessarily imply slave. The reason said at the bar to have been given by Lord C. J. *Holt*, in that case, as the cause of his doubt, viz: That the moment a slave sets foot in *England* he becomes free, has no weight in it, nor can any reason be found, why they should not be equally so when they set foot in *Jamaica*, or any other *English* plantation. All our colonies are subject to the laws of *England*, although as to some purposes they have laws of their own. There was once a doubt, whether, if they were christened, they would not become free by that act, and there were precautions taken in the colonies to prevent their being baptized, till the opinion of Lord *Talbot* and myself, then *Attorney* and *Solicitor-General*, was taken on that point. We were both of opinion, that it did not at all alter their state.<sup>3</sup> There were formerly vil-

<sup>1</sup> Register Brevium, 102 b. (edition 1687) gives a form—"quendam H. Scotum per ipsam W. de guerra captum tanquam prisonem suum."

<sup>2</sup> A misrepresentation; as Mr. Hildreth very justly remarks: *Despotism in Am.*, p. 197.

<sup>3</sup> This opinion was, properly speaking, on a question of private international law,

leins or slaves in *England*, and those of two sorts, regardant and in gross; and although tenures are taken away, there are no laws that have destroyed servitude absolutely. Trover might have been brought for a villein. If a man was to come into a court of record, and confess himself villein to another, (which is one way of being a villein,) what the consequence would be I will not say, but there is no law to abolish it at this time."

§ 187. The case of *Shanley vs. Harvey*, 1762, 2 Eden's R. 126, was by an administrator against Harvey a negro, certain trustees, and the next of kin, to account for part of the personal estate,—a sum of money given shortly before death, by the deceased, to the negro. Among the circumstances mentioned was—that this negro after having been brought to England had been given to the deceased, "who had him baptized, and changed his name." The claim does not appear to have been for the negro, but for the money; and the question to have been whether he was capable of receiving the money as a gift. The whole decision is, by the Lord Chancellor, Northington, "As soon as a man sets foot on English ground he is free: a negro may maintain an action against his master for ill usage, and may have a *Habeas Corpus* if restrained of his liberty."

§ 188. It will be noticed that most of the cases in which the above decisions were made were in *trover*; to maintain which it was essential that the subject of the action should be property—*goods* found by another and converted to his use. Now it has been shown that a condition of voluntary servitude may

as determining the relations of persons domiciled in different parts of one empire, and the extent or jurisdiction of the law supporting slavery in the colonies; for the slaves referred to in the opinion are such as were brought into England by persons domiciled in the English colonies and intending to return thither with them. In this view it would be noticed in another chapter. But it will be given here because, as it is worded, it would seem to support slavery in England, as the condition of a domiciled inhabitant. It is taken from an essay published in London by Granville Sharpe, about the year 1772.

"In order to certify a mistake that slaves become free by their being in England, or being baptized, it hath been thought proper to consult the King's Attorney and Solicitor General in England, thereupon, who have given the following opinion subscribed with their own hands. Opinion. We are of opinion that a slave by coming from the West Indies to Great Britain or Ireland, either with or without his master, doth not become free; and that his master's property or right in him is not thereby determined or varied; and that baptism doth not bestow freedom on him, nor make any alteration in his temporal condition in these kingdoms. We are also of opinion that the master may legally compel him to return again to the Plantations. June 14, 1729. P. Yorke; C. Talbot."

be supported by the law while the character of property, or a chattel condition, is not attributed to the person held in bondage. A decision that trover did not lie, for the reason that slaves were not articles of commerce, did not therefore necessarily involve the conclusion that negroes could not be held in servitude in England in the same manner as villeins had been; and the claim might have failed only because the proper form of remedy had not been resorted to. Thus in *Smith vs. Gould*, though it was decided that trover would not lie, as for articles of merchandise, yet "the court seemed to think" that the plaintiff might have sustained an action of trespass against the defendants for depriving him of a person held by him as a captive, even if he had acquired his rights over such captive by purchase. So in *Butts vs. Penny* the objection of Thompson, *arguendo*, was against the form of action, founded on the theory of a finding of *goods* or *chattels*;—"here could be no property in the plaintiff more than in villeins."

In the cases where *trover* was maintained, it appears that the court did not look for an act of legislation, or a local custom, or a custom of the realm, creating that property, but referred to the general usage or custom among all nations—the custom of merchants. Thus in *Butts vs. Penny*, the verdict found that negroes were usually "bought and sold in India, and if this were sufficient property for conversion was the question;" and the court said "they are by usage *tanquam bona*," qualifying it with the addition, that when they became Christians they would be enfranchised: and in 2 Lev. 201, "being usually bought," &c. So in 3 Levinz, 336, negroes are said to be merchandise by the same law that animals are known to be merchandise, i. e. universal usage. Hardwicke says the negro slave is "as much property as any other thing;" and what are persons and what things is decided by the *law of nations* hereinbefore described; that is, universal jurisprudence gathered from the general custom of civilized nations. In the only one of these decisions which declares the negro to be a freeman upon entering England, *Smith vs. Brown and Cooper*, Holt says at the same time, that one might be a villein in England though not a slave. This language must be taken to mean, that the law of villenage

is the only law of involuntary servitude in England, and that this law, being local and prescriptive, could not apply to an African.<sup>1</sup>

§ 189. According to Granville Sharpe's essay many instances had occurred, before the date of its publication, of slaves being bought and sold in London: and Dunning states, in his argument for the master, in Somerset's case in 1772, "from the most exact intelligence I am able to procure there are at present here about 14,000 slaves."<sup>2</sup>

From these various cases of the actual support of slavery of negroes in England between the years 1677 and 1772, it may be gathered, that the prevailing legal opinion supported the doctrine that negroes might be held as slaves under the common law of England, either as chattel slaves, or persons in a condition of involuntary servitude.

It is however herein claimed, that the true doctrine on this point, resulting from the principles of jurisprudence herein-before set forth, was this,—negroes or Moors, and Indians, while heathen and barbarian, could be held in chattel servitude as merchandise, in England, by the judicial recognition of natural reason in the historical *law of nations*; forming a part of the common law of England, because being a recognized exposition of natural reason.<sup>3</sup> But upon becoming baptized and domiciled inhabitants of a Christian country, they became recognized as legal persons, either by the *law of nations* or by principles derived from Christianity by the supreme power in England, and

<sup>1</sup> Molloy: De Jure Maritimo, London, 1744, B. 3, c. i. 7. "Though Slavery and Bondage are now become discontinued in most parts of Christendom, and to that degree that for the person of a man, be he Moor or other Indian, a Trover is not now maintainable by the laws of England"—citing Salk. 666, 667—goes on to say that there may be a lawful bond service for life.

<sup>2</sup> Wade's British Chronol. p. 833: "Prior to this judgment (Somerset's case) the personal traffic in slaves resident in England had been as public in London as in the West India Islands. They were openly sold on the Royal Exchange." By Lord Stowell, 2 Hagg. Adm. R. p. 105: "They were sold on the Exchange and other places of public resort by parties themselves resident in London, and with as little reserve as they would have been in any of our West India possessions. Such a state of things continued, without impeachment, from a very early period up to nearly the end of the last century."

<sup>3</sup> In Neal v. Farmer, 9 Geo. 555-576, the court, in arriving at the conclusion that it is not felony at common law to kill a negro slave, is greatly embarrassed by assuming that slavery could only have been supported in England by the law of villenage, and yet holding that it had a legal existence in Georgia without positive legislation, and as property recognized by "the law of nations."



having territorial extent therein ;<sup>1</sup> and there was thereafter no principle, attributable to the *law of nations*, or any other indication of natural reason, which could be judicially taken to sustain any right of control in one private individual over another, irrespective of the relations of the family ; and the local law of villenage could not apply to persons who had either themselves come, or whose immediate ancestors had come into England from abroad.

Besides, the *law of nations*, it has been shown, is susceptible of change (*ante* § 39). It may have changed in Europe, during the period between the date of the last of these decisions and that of Somerset's case, from thus supporting chattel slavery to denying it altogether. It will be difficult for a judicial tribunal to discriminate when the *law of nations* thus changes, but after a lapse of years it may be easy to point out an alteration. The opportunities to do this occur oftener in the application of international law, because the recognition of a *law of nations* is more distinct therein than in the application of municipal or internal laws (*ante* § 101).

§ 190. The decision of the King's Bench in 1772, in favor of the freedom of the negro James Somerset, might have been maintained upon the doctrine just stated. The question arising in that case was more properly an international or *quasi*-international one ;—a question under the private international law existing between different jurisdictions of the British Empire, which will form the subject of a separate chapter (ch. vii.) : the owner of the negro being still the domiciled inhabitant of a colony, and the question of the domicil of the negro being dependent on that of his condition. But it does not appear that in the view of the court the case was affected by this circumstance, and the language of the decision would apply with the same force to parties supposed to have a domicil in England.

The judgment finally pronounced by Lord Mansfield in this case, June 22, 1772, is thus given in Loft's R., p. 18 :—

“ On the part of Somerset, the case which we gave notice

<sup>1</sup> There appears to be a recognition of this principle in Horne's *Mirror*, c. 2, sec. 28. “ Villeins become free many ways ; some by baptism, as those *Saracens* who are taken by Christians or bought, and brought to Christianity by grace.”

<sup>2</sup> See also the report in 20 Howell's *State Trials*, p. 1.

should be decided this day, the court now proceeds to give its opinion. I shall recite the return to the writ of *habeas corpus*, as the ground of our determination; omitting only words of form. The captain of the ship, on board of which the negro was taken, makes his return to the writ in terms signifying that there have been and still are, slaves to a great number in Africa; and that the trade in them is authorized by the laws and opinions of Virginia and Jamaica; that they are goods and chattels; and as such saleable and sold. That James Somerset is a negro of Africa, and long before the return of the king's writ was brought to be sold, and was sold to Charles Stewart, Esq., then in Jamaica, and has not been manumitted since; that Mr. Stewart, having occasion to transact business, came over hither with an intention to return, and brought Somerset to attend and abide with him, and to carry him back as soon as the business should be transacted. That such intention has been and still continues; and that the negro did remain till the time of his departure in the service of his master, Mr. Stewart, and quitted it without his consent; and thereupon, before the return of the king's writ, the said Charles Stewart did commit the slave on board the *Ann and Mary*, to save custody, to be kept till he should sail, and then to be taken with him to Jamaica, and there sold as a slave. And this is the cause why he, Captain Knowles, who was then and now is commander of the above vessel, then and now lying in the river of Thames, did the said negro, committed to his custody, detain; and on which he now renders him to the orders of the court. We pay all due attention to the opinion of Sir Philip Yorke, and Lord Chief Justice Talbot, whereby they pledged themselves to the British planters, for all the legal consequences of slaves coming to this kingdom or being baptized, recognized by Lord Hardwicke, sitting as chancellor, on the 19th of October, 1749, that *trover* would lie; that a notion had prevailed, if a negro came over, or became a Christian, he was emancipated, but no ground in law; that he and Lord Talbot, when Attorney and Solicitor-General, were of opinion, that no such claim for freedom was valid; that though the Statute of Tenures had abolished villains regardant to a manor, yet he did not conceive but that a man might still

become a villain in gross by confessing himself such in open court. We are so well agreed that we think there is no occasion of having it argued (as I intimated an intention at first) before all the judges, as is usual, for obvious reasons, on a return to a *habeas corpus*; the only question before us is, whether the cause in the return is sufficient? If it is so, the negro must be remanded; if it is not, he must be discharged. Accordingly, the return states, that the slave departed and refused to serve; whereupon he was kept, to be sold abroad. So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely different in different countries. / The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political; but only by positive law, which preserves its force long after the reasons, occasion, and time itself, from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged."

§ 191. However correct the decision of the court may have been in declaring that the negro could not be held in slavery in England, the arguments given in support of it by Lord Mansfield are open to obvious criticism under well-established principles. Admitting that the statutes and public acts relating to the commerce in negroes were not operative in England, and that there was no "*positive law*," meaning positive legislation, to sustain the servitude of the negro in this case, the reason given, for not sustaining it, is not a good judicial reason. Lord Mansfield says—"the state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political." If he intended to say that the moral and political reasons against slavery were such that even positive legislation, intending to produce it, was not to be sustained; that it was contrary to a law of nature which must be presupposed in all legislation, and which limited the highest power in the state,—(that is, a law in the secondary sense—a necessary condition of things), then it was superfluous and contradictory to say "that

it could only be introduced by positive law,"—"it is so odious that nothing can be suffered to support it but positive law,"—that "so high an act of dominion must be recognized by the law of the country where it is used;" for had there been such an act of legislation, it would, by this reasoning, have been void and inoperative.<sup>1</sup> If he intended to say that there were no moral or political reasons to his mind for such a law, if it was in existence, or for its introduction by the legislative power,—that was beyond his province as a judge. The question was not of its introduction, but of its existence. The reasoning of Lord Mansfield in this case would have been equally good for a judge in the colonies, and would have annihilated slavery in British America also. The historical origin of that slavery was entirely overlooked when he declared "that it could not be judicially recognized any where unless supported by positive law";—that is, supposing him to have intended positive legislation by the term "positive law." That proposition, which has since this decision been the text for so many essays in England and America, is in direct contradiction to the whole history of chattel slavery in every country where it has existed: for, as has been shown in this chapter, it has always originated through a judicial recognition of natural reason, and of universal jurisprudence, or the historical *law of nations*, taking effect as international and municipal law, because an exposition of natural reason which must be presumed to be received by the state

<sup>1</sup> The language of the court in this case is an illustration of the remark of Savigny: *Vocation of our Age for Legislation and Jurisprudence*, Hayward's Transl., p. 136: "Thus it appears, that when old nations reflect how many peculiarities of their law have already dropped off, they easily fall into the error just mentioned, holding all the residue of their law to be a *jus quod naturalis ratio apud omnes homines constituit*." (See also p. 134 of the same treatise.) If Lord Mansfield professed to recognize a universal jurisprudence, distinct from that peculiar to his own country, deriving it from the concurrent testimony of civilized nations or of reasoning mankind,—and it will be admitted that he did so, if ever an English judge—it would be important to know whom he considered *nations*, or whom reasoning, or reasonable, *men*. It is related of him that he once said in debate, alluding to Otis' *Essay on the Rights of the Colonies*, that "he seldom looked into *such things*: though in *Chamberlain of London vs. Allen Evans*, in the House of Lords, he expressed his admiration of President De Thou's dedication of his history, which he said he never could read without rapture." (See *North American Review*, Jan'y, 1826, p. 183. *Life of J. Quincy, jr.*) It would appear, therefore, that he had some private rule to measure authorities on the concurrent testimony of mankind, which may not be orthodox with all who quote his opinions, and that he thought that some persons and nations were not entitled to have an opinion.

promulgating law as a *jural rule*; and it has very rarely, if ever, been originally established in a country by positive legislative enactment.<sup>1</sup>

The true nature of this decision, and its force as a juridical precedent in the colonies, will be noticed in another chapter. Whatever may be thought of the arguments by which it is supported, its efficacy in determining the question, as one of the effects of the municipal law of England, must be admitted: followed as it has been by so long a period of continued approval: and the doctrine taken to be established, that in England no person can be held in involuntary servitude unless by the force of some statute.

<sup>1</sup> Mr. Seward, in his speech in the U. S. Senate, March 11, 1850, (Works, vol. I., p. 80,) says: "Slavery has never obtained any where by express legislative authority, but always by trampling down laws higher than any mere municipal laws—the law of nature and of nations." The fact that it has so "obtained," that is—has become recognized as lawful—without "express legislative authority," is the best possible proof that its existence is accordant with "the law of nature and of nations:" unless the individual moral judgment of the speaker is the standard of "laws higher than any mere municipal laws."

NOTE.—In the case of the slave Grace, (1827,) 2 Hagg. R., p. 105, (Scott,) Lord Stowell said: "It appears that Lord Mansfield was extremely desirous of avoiding the necessity of determining the question: he struggled hard to induce the parties to a compromise, and said, he had known five cases so terminated out of six; but the parties were firm to their purpose in obtaining a judgment, and Lord Mansfield was at last compelled, after a delay of three terms, to pronounce a sentence which, followed by a silent concurrence of the other judges, discharged this negro; thereby establishing that the owners of slaves had no authority over them in England, nor any power of sending them back to the colonies. Thus fell, after only two and twenty years, in which decisions of great authority had been delivered by lawyers of the greatest ability in this country, a system, confirmed by a practice which had obtained, without exception, ever since the institution of slavery in the colonies, and had likewise been supported by the general practice of this nation, and by the public establishment of its government, and it fell without any apparent opposition on the part of the public. The suddenness of this conversion almost puts one in mind of what is mentioned by an eminent author, on a very different occasion, in the Roman History, 'Ad primum nuntium cladis Pompeianæ populus Romanus repente factus est alius:' the people of Rome suddenly became quite another people.

"The real and sole question which the case of Somerset brought before Lord Mansfield, as expressed in the return to the mandamus, was, whether a slave could be taken from this country in irons and carried back to the West Indies, to be restored to the dominion of his master? And all the answer, perhaps, which that question required was, that the party who was a slave could not be sent out of England in such a manner, and for such a purpose; stating the reasons of that illegality. It is certainly true

that Lord Mansfield, in his final judgment, amplifies the subject largely. He extends his observations to the foundation of the whole system of the slavery code; for in that passage he says 'that slavery is so odious that it cannot be established without positive law.' Far from me be the presumption of questioning any *obiter dictum* that comes from that great man upon that occasion; but I trust that I do not depart from modesty that belongs to my situation, and I hope to my character, when I observe that ancient custom is generally recognized as a just foundation of all law; that villages of both kinds, which is said by some to be the prototype of slavery, had no other origin than ancient custom; that a great part of the common law itself in all its relations has little other foundation than the same custom, and that the practice of slavery, as it exists in Antigua and several other of our colonies, though regulated by law, has been in many instances founded upon a similar authority."

On one of the trials of the case of *Oliver vs. Weakly*, in the U. S. Circuit Court for harboring runaway slaves, Mr. Justice Grier said:—"On this subject Lord Mansfield has said some very pretty things, (in the case of *Somerset*,) which are commonly quoted as principles of the common law. But they will perhaps be found, by examination of later cases, to be classed with rhetorical flourishes rather than legal dogma." *Newspaper Rep.*, and see *American Law Register*, vol. I. Philadelphia, 1858.

## CHAPTER V.

THE ESTABLISHMENT OF MUNICIPAL LAW IN THE COLONIES,—THE SUBJECT CONTINUED. PRINCIPLES DETERMINING THE CONDITION OF PERSONS TO WHOM THE LAW OF ENGLAND DID NOT EXTEND AS A PERSONAL LAW.

§ 192. Although the various rights and liberties which were known to the law of England as the privileges and immunities of a subject of English birth, and which are, in the third chapter, supposed to have been attributed to the English colonists in America, are ascribed in that law to an origin in natural reason, being often juridically called "the natural rights of Englishmen," their legal existence and enjoyment is still dependent on the sovereign will of the state ; because, as has been shown in the first chapter, there is no natural rule having the force and power of law in juridical recognition, except as it forms part of the positive law—the law resting on the will of some sovereign political state or nation.<sup>1</sup> The legal conditions or status of private persons, under any national jurisdiction, whether determined by municipal (internal) or international law as before defined, are, within that jurisdiction, judicially held to be in accordance with natural reason, however widely the relations in which they consist may differ from those known to other jurisdictions. This is a result of the jural character of the state. But however natural they may be in an ethical point of view, that is, however consistent with the essential conditions

<sup>1</sup> *Ante*, §§ 7, 8, 16.



of human existence, these relations can be judicially known in any jurisdiction, (i. e., any territory wherein laws are judicially enforced,) only by a previous recognition of law in the ascertained will of some state or national sovereignty, and of certain persons as its subjects, or as persons bound by its provisions. This law must be known both as territorial law—law operating within certain geographical limits, and as personal law—law operating on certain persons throughout the dominion of a certain national sovereignty.<sup>1</sup>

§ 193. It is for this reason that common law rights, or liberties, of private persons, though necessarily taken to be accorded with natural reason when attributed to persons born in England, were not judicially attributed, in the colonies, *as by a personal law*, except to those who had acquired those rights as *juridical* rights under the territorial law of England; that is to say, subjects of English birth, and those aliens to whom, by international treaties, the terms of patents and charters for the plantations, and statutes of naturalization, the same personal law had been extended.<sup>2</sup> And, since wherever laws of privilege or of disability have applied as personal laws they have generally an hereditary character, or are the law of a family as well as an individual, the same law of condition would, perhaps, on principles of common law origin, have continued to have a personal extent to their descendants.<sup>3</sup> The claim of the descendants of English colonists to the benefits of the same personal law was,

<sup>1</sup> See *ante*, § 26.

<sup>2</sup> *Campbell vs. Hall*, Cowp. 208. "The law and legislative government of every dominion equally affects all persons and all property within the limits thereof, and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the laws of the place." It is true that "the law and legislative power" has equal authority in respect to all persons and things, but it is not, in its operation, the same rule for all. Lord Mansfield said in continuation of the above,—“An Englishman in Ireland, Minorca, the Isle of Man, or the Plantations, has no privilege distinct from the natives.” This certainly could not have been said of the Indian territories of the empire, where the ancient laws applied to the native races. Compare Sir William Jones’ various charges, in Calcutta, in vol. 3, Works, 4th.

<sup>3</sup> The common law has been called “the greatest inheritance that the king and the subject have.” See Bowyer’s Univ. Pub. Law, p. 10,—“The common law is our birth-right and inheritance,”—Story Commen. § 157,—“Freedom \* \* the inheritance of the inhabitants and their children, as if they were treading the soil of England.”—3 Barn. and Cress., 463. “The laws of England are the birthright of the people thereof.”—Stat., 12 & 13 Will. III., c. 2, The Act of Settlement. “According to the ancient doctrine of the common law.”—1 Bl. Comm. 128, notes Plowden.

however, as before shown, independently secured, by positive legislation, in the charters.

When this law of personal rights and liberties acquired also the character or extent of a territorial law in America, its authority *as such* was, strictly speaking, correspondent with the territorial limits of the separate colonies; being a territorial law for each singly; resting therein on the sovereignty vested in the local government and the Crown, or the Crown and Parliament, legislating for that colony only.<sup>1</sup> Though, since the rights and privileges secured by this law had a like legal recognition in any part of the British empire, it had a certain general territorial extent also throughout all the colonies. But this took place, properly speaking, by reason of its personal character, and by its taking effect as a *quasi* international private law between those several jurisdictions; as will hereinafter be more particularly shown.

§ 194. In the various recognitions of the liberties of the colonists, which may be found either in patents and charters, or in colonial declarations and protests, it is to be observed that they are claimed or continued as prescriptive and hereditary; as being a consequence of national character, fixed by birth and descent; their foundation being nowhere based on principles assumed *a priori*, as a law of nature, but on precedent, custom and legislation.<sup>2</sup> Whatever may have been the doctrines of the early colonists as to a foundation of legal rights and obligations in nature or revelation superior to that found in the common law, it cannot be said that they became sufficiently defined, or authoritatively expressed, to be considered in any degree a law of the land. There may probably be found in various instances

<sup>1</sup> See *ante*, § 136.

<sup>2</sup> There were indeed two *schools* among the advocates of the liberties of the colonies; see Chalmers' Pol. Ann., p. 695. Jefferson, writing to Judge Tyler, Corresp. vol. IV., p. 178, (Randolph's ed.) said, "I deride, with you, the ordinary doctrine that we brought with us, from England, the *common law rights*. \* \* The truth is, we brought with us the *rights of men*, of expatriated men." In the same letter he advocates the rejection of all English decisions from the accession of George III., saying that this would give "the advantage of getting us rid of all Lord Mansfield's innovations, or civilizations, of the common law." If American law is based on the law-nature theory—is Mansfield or Jefferson the better authority; or will their agreement determine a point?

of colonial legislation some vague recognition of rights in individual members of society superior to legislative power, as in the preamble to the laws of Massachusetts Bay Colony, 1672: "Forasmuch as the free fruition of such liberties, immunities and privileges as humanity, civility and Christianity call for, as due to every man in his place and proportion, without impeachment and infringement hath been and ever will be the tranquillity and stability of churches and commonwealths, and the denial or deprival thereof the disturbance, if not ruin of both, it is therefore ordered by this court," &c. But though such declarations recognize a rule binding on the consciences of the authors and executors of human laws, they can have but little practical effect as a guarantee to the subject or citizen, while the demands of "humanity, civility and Christianity," and the "place and proportion" of every man are left undetermined, or to be ascertained by the actual holders of legislative and executive power; and such declarations might be consistently subscribed by the possessors of the most arbitrary authority.<sup>1</sup>

§ 195. The condition of those natural persons under the imperial and colonial dominion in America who had not, by national character or descent, a claim to the personal extent of the law of England, must also have been determined by positive law, that is, law derived either by the judicial application of natural reason, or from the positive legislation of those depos-

<sup>1</sup> During the later part of the controversy between the colonists and the imperial government in respect to their political rights, there were indeed many instances in which the rights of the individual colonists were asserted on principles of wider extent. Some of these, which proceeded from public bodies, will be noticed hereafter. Otis, in his rights of the Colonies, p. 43, vol. I., Amer. Tracts, London, 1766. said: "The colonists are by the law of nature freeborn, as indeed all men are, white or black. \* \* There is nothing more evident, says Mr. Locke, than that creatures of the same species and rank, promiscuously born to all the advantages of nature and the use of the same faculties, should also be equal one among another, without subordination and subjection," &c. And p. 51: "Every British subject, born on the continent of America, or in any other of the British dominions, is by the law of God and nature, the common law and by Act of Parliament, (exclusive of all charters from the Crown,) entitled to all the natural, essential, inherent and inseparable rights of our fellow-subjects in Great Britain." But Otis's doctrine had not been law in the colonies. Mr. Locke, in his scheme of government for Carolina, expressly sanctions slavery, and in one of his dissertations contemplates it as a natural element in any civil state. See Locke's Works, vol. 2, p. 181. See 2 Kent's Comm. pp. 1, 2, as illustrating a very common want of discrimination in speaking on this point.

itaries of sovereign power over the colonies which were recognized by the public law of the empire during the colonial period. And the determination of their condition will be a question of municipal (internal) or of international law, according to the character of the persons whose condition is to be determined.<sup>1</sup>

Although all the natural persons within the territorial limits of the colonies, to whom, according to the views above set forth, the English law could not apply as a personal law, were, by the supposition, aliens to the territory of England, they were to be distinguished as either,

1. Native inhabitants of the colonial territory, who therefore were not aliens in respect to the imperial and colonial jurisdiction, in the same sense as persons entering the same territory who had been born in a foreign country, that is, one never within the limits of the British empire ; or,

2. Those who entered the territory as alien, being alien, by birth, to the colonial territory as well as to the imperial jurisdiction, by the axiomatic principles of international law—the necessary law of nations, hereinbefore described.<sup>2</sup>

§ 196. The American continent having been occupied before its colonization by savage tribes living without any such established civil polity as is recognized by the public international law of civilized nations, the lands settled by the English were “desert and uncultivated” in respect to any “ancient laws,” and therefore, it would seem, “chiefly” of the first of those two classes of colonies which Blackstone has described, where the only system of laws would be that brought by the colonizing people from their original residence ; and that this fact did afford a basis for a part of the laws prevailing in the colonies has already been shown in the third chapter.

But though the territory occupied by the native inhabitants was thus regarded as never having been under foreign legislative dominion, they themselves were, of necessity, treated as having a distinct nationality and political corporeity, apart from the sovereignty over the land. They might be public enemies, and

<sup>1</sup> *Ante*, §§ 53, 54.

<sup>2</sup> *Ante*, § 49. /

as such their rights and obligations might be affected by the laws of war, which are classed as international law. By principles of the *law of nations* then received as applicable in this international law, they might be made captives. And, independently of their individual liability to captivity, the consequences of an acquisition by conquest, mentioned by Blackstone, were applicable to them as nations, or as a class of persons ; the law as to them was such as the king pleased. That is to say, there being no territorial law affecting them, the law was such as might be promulgated by positive legislation on the part of the crown or of the local governments allowed or constituted by the crown ; or by the judicial application, by tribunals under the royal authority or that of the local governments, of rules of natural reason derived by them according to the judicial criteria before given.<sup>1</sup> This law, in being applied to persons known as native or domiciled subjects of the imperial or colonial jurisdiction, would be classed as municipal (internal) law, according to the description of that law given in the first chapter.

§ 197. With regard to those persons within the colonial territory who were neither natives of Great Britain nor of the colonial territory, their condition must have been determined by *international* private law ; at least until they had acquired the character of domiciled subjects. This international law, according to the principles set forth in the first and second chapters, would be known either from positive legislation, (proceeding in this case from the sources of private law mentioned in the third chapter,) or by judicial application of natural reason, according to the allowed judicial criteria. After becoming domiciled inhabitants their future condition would be determined by the municipal (internal) law of the jurisdiction, derived either

<sup>1</sup> In Shower's Parliamentary Cases, 30, 31 ; in the case of *Dutton v. Howell*, it was said by counsel *arguendo*,—" Though a matter may justify a governor for an act done in his government which would not justify him for the same act done in England, yet the governor must show that he hath pursued the rules of law in that place ; or in case of no positive laws, the rules of natural justice ; for either the common law, or newly instituted laws, or natural equity, must be the rule in those places." So in *Salk.*, p. 411, the sentence before cited, § 123, n. 2, continues,—“ And that in such cases, where the laws are rejected, or are silent, the conquered country shall be governed according to the rule of natural equity.”

from imperial or provincial legislation, or by judicial application of rules of natural reason, according to the criteria above referred to ; having a like territorial extent and authority with that law which determined the condition of those *native* inhabitants to whom the English law did not originally apply as a personal law, i. e., the so-called aboriginal inhabitants.

§ 198. In order therefore to determine the relations, rights and duties constituting the *legal condition* of these two classes of persons in the colonies, it is necessary to ascertain what rules were at that period to be judicially received as rules of natural reason applying to natural persons independently of the law of England ; which law, so far as it applied to *all* persons within any particular territory, had such extent in *England* only, and as a personal law in the colonies applied only to the colonists of *English birth* or *race*.

Since the period of time referred to, and in which the rule of natural reason was to be ascertained, was that of the first existence of law as to such persons within the colonial jurisdiction, (there being as yet no positive legislation, and no national judicial precedents in respect to persons known as the inhabitants of that jurisdiction,) reference must be had to such indications of natural reason as are judicially receivable, because indicative of the presumed will of the state in cases wherein its existing legislation and local precedents do not apply. Or, to express the same idea in a somewhat different form, since at the first establishment of civil government in the colonies there were no national judicial precedents for the colonial tribunals, except such as were comprehended in the territorial law of England, (which law, in the colonies, applied only to the English and their descendants, and as a personal law,) the only principles of the English law which could be judicially applied to any other persons within the colonial territory, were such as could be taken to be universal principles ; that is, principles which, while recognized by the state in its juridical action, were not promulgated either as law for England only, or for certain persons as its inhabitants, (*jus proprium*,) but principles received by the state without reference to their application to

any particular territory ; or such as the tribunal might suppose the state would apply independently of all territorial distinctions. This, according to what has been said in the second chapter, would involve the judicial recognition of a universal jurisprudence—the science of *natural* law in the only sense in which it can be acknowledged in jurisprudence properly defined—the science of the historical *law of nations*, manifested through the application of private international law, and judicially received by tribunals of various national character as being founded in natural reason, because known in the history of jurisprudence to have had general extent and application in municipal and international law.<sup>1</sup> In order then to determine what principles had this character, or could be judicially taken to have this character, at the time of the planting of the colonies, it is necessary to examine the history of jurisprudence among all nations, or, at least, among the civilized nations of Europe down to that period ; tracing the general recognition of any legal principles which applied to the relations, rights, and duties of private persons with such effect as to become elements in a condition of freedom or its opposites.

§ 199. The mode in which such principles must have been ascertained, and their effect upon relations of private persons, have already been set forth in the preceding chapter, when considering the question whether such principles could take effect in England as part of the common law. It was there shown that at the time of the first planting of the colonies the prevailing legal doctrine would seem to have sustained the chattel-slavery of Moors, African negroes, and Indians, at least while heathen or infidel, even in England. But even if it must be held that the English law of the privileges and immunities of Englishmen applied to every person on English soil, and so rendered the maintenance of slavery legally impossible there, yet there was not, at that time, at least, any such universal personal and territorial extent to be judicially attributed to that law, that it should be held to obtain wherever the do-

<sup>1</sup> Compare *ante*, §§ 19, 34, 96–101.



minion of the British empire extended.<sup>1</sup> Personal liberty or freedom of condition was not, by English law, so attributed to every natural person that slavery was incompatible with the English sway in other regions, or was abolished by it, as one of those laws, or as the effect of one of those laws, which are contrary (in English jurisprudence) to the laws of God, according to the principle which has been noticed in a preceding section.<sup>2</sup>

Upon the occupation of the western continent by the European nations, the international rules of warfare received by those nations, with the ancient law of slavery resulting from captivity, in wars with savage tribes, were, as has been already said, generally applied to the native races. And, long after the foundation of the English settlements, their unwillingness or incapacity to unite with the colonists in social and civil life, rendered it impossible to extend to them the obligations and privileges of the same system of laws. The intercourse of the colonists with the aborigines was regulated only by such rules as the local governments and the representatives of the crown supposed to be in accordance with natural reason, applied to the international intercourse of civilized communities with barbarians, or to be supported by the usage of other Christian nations. The views entertained by Europeans, during the earlier period of colonization, of their obligations in this respect allowed, in most cases, a practical denial of all legal rights in the heathen and savage, as opposed to the interests of the Christian

<sup>1</sup> Whether the English law, meaning the territorial law of the British islands, attributes, or did at any time during the colonial period, attribute the rights sometimes known as the personal rights of Englishmen to all natural persons within that geographical domain, i. e., the British islands, irrespectively of race or birth, is a question the elements of which have already been considered in the previous chapter, as a topic of the municipal (internal) law of England. But it still remains to be viewed as a question of the private international law of that dominion; that is, a question of the law which, in England, determined the condition of persons regarded as *aliens* to the territory of England. See *post*, ch. vii.

<sup>2</sup> See *ante*, p. 115, n. 2. That slavery, in India, was maintained by the British judicature because sanctioned by Hindoo and Mahomedan law,—see Harrington's *Analysis*: Calcutta, 1817, vol. i. pp. 78, 279, and vol. iii. p. 748, note, citing an official paper by Mr. H. Colebrooke, in 1812. Also, a work written with view of publication in America, William Adams' *Law and Custom of Slavery in British India*: London, 1840. That in the British possessions on the coast of Africa, slavery among the natives is recognized by the authorities as matter of necessity,—Cruikshank's *Eighteen Years on the Gold Coast*, vol. ii. ch. 9.

or European colonist.<sup>1</sup> The right of the native inhabitants in the lands they occupied was considered, at best, only qualified and temporary, and their lives and property received, even in periods of professed peace, but little protection from the colonial laws; it being in fact impossible, in reference to savage races, to make those discriminations between a state of peace and a state of war, which are so important in determining the legal character of acts incident to the intercourse of civilized nations.<sup>2</sup> The generally received doctrines of the difference in rights between Europeans and Moors, Africans and Indians, together with the international application of those doctrines has been stated in the preceding chapter. The warlike and intractable character of the North American Indian would have prevented, had there been no moral restraint, the systematic oppression and enslavement which was practised in the islands and the southern parts of the continent by the Spaniards. In the English colonies the aboriginal inhabitants receded before the advancing settlements, and never became, unless in a few isolated cases, incorporated with the body of the white inhabitants, and they have continued, as a race, to form separate communities, whose relations to the whites have been determined under special *quasi*-international laws.<sup>3</sup> In the earlier history of all the colonies there are instances of their being reduced to slavery by

<sup>1</sup> 1 Story's Comm. §§ 1-10. 1 Banc. 145, 167, 270. 1 Hildr. 69, 410. But the instructions from the authorities in England, repeatedly enjoined justice towards the natives, 1 Banc. 346, and Charter of Mass. Prov., in 1692. Many of the earlier colonial laws propose an adoption of Indians into the civil community. See Virginia Laws, 1619, N. Y. Hist. Soc. Coll. 2d series, vol. iii. part 1, p. 331. Mass. Laws, 1688, *post* ch. vi.

<sup>2</sup> Francis Victoria, A. D. 1557, opposed the current opinions of his day in asserting that hostilities against the native tribes could not be justified on the ground of their vices, or of their Paganism. "Indis non debere auferri imperium ideo quia sunt peccatores, vel ideo quia non sunt Christiani." See Mackintosh, Hist. Eth. Phil. p. 109. The same opinion was held by Ayala, 1597, and by Covarruvias and others. See Hallam's Lit. of Europe. Victoria held, however, that it was lawful to enslave Pagan captives. See Wheaton's Law of Nations, Introd. p. 40. During the sixteenth century, in wars of European states the captor had a property in his prisoner, which was assignable, 1 Motley's Rise of D. R. p. 151. Bynkershoek, Quæst. Jur. Pub. lib. i. c. 3, that a German officer commanding in Ireland, in 1690, is said to have ordered prisoners to be transported to America, to be sold as slaves, and to have been only deterred by the threat of the Duke of Berwick, that, as a retaliatory measure, he would send his prisoners to the galleys in France.

<sup>3</sup> Dred Scott v. Sanford, 19 Howard R. 403, 404. Kent's Comm. Lect. LI.

the local authorities ; usually, when taken captive in war, or in punishment for violations of the code of intercourse prescribed by the colonial powers.<sup>1</sup> There were also instances of their being kidnapped and sold ; but this was contrary to express statute, in most, if not in all the colonies, and to the *law of nations* as generally recognized in the international intercourse of Europeans with heathen and barbarian nations.<sup>2</sup>

§ 200. It was the colonization of America that gave occasion to a wider and more important application of that modification of the ancient doctrine of chattel slavery into a personal law for Moors and negroes which was described in the previous chapter. Negro slaves were introduced into the Spanish colonies as early as the year 1501, and the importation received the sanction of a royal ordinance about the same period. Charles V. granted letters patent to transport slaves into the Spanish colonies in 1543. The French, English and Dutch navigators joined in the trade of importation, and it became an ordinary branch of commercial enterprise, in which merchants of every maritime nation in Europe took part. Sir John Hawkins brought slaves into the Spanish West India Islands in 1562.<sup>3</sup>

Slaves were brought into the North American colonies shortly after their first settlement. Negro slavery in Virginia is said to have commenced with the importation of a cargo of slaves from Africa, by a Dutch vessel in 1620.<sup>4</sup> Hutchinson says that negroes were brought in very early among the colonists of Massachusetts, but that they had a law against slavery, except of prisoners taken in war. The Massachusetts Fundamentals 1641, sanction slavery by purchase.<sup>5</sup> Also the law of

<sup>1</sup> 2 Winthrop's N. E. 360. 1 Banc. 168. 1 Hild. pp. 37, 289, 251, 269, 489, 490, 538, 557 ; 2 do. 271. Hewit's Hist. of S. Car. vol. i. p. 78, and *post*, ch. vi.

<sup>2</sup> See *ante*, § 166. During the first century after the discovery of America, natives of the continent were frequently seized and sold as slaves in Europe and the W. I. islands. See 1 Banc. 167-169, and the citations.

<sup>3</sup> For the earlier history of slavery, in connection with that of the American continent, see 1 Banc. 159-179, and the authors cited in the preceding chapter. Charters incorporating adventurers with a monopoly of the importation of slaves from Africa into America were granted by James I., Charles I., and Charles II., "and in the year 1792, twenty-six acts of parliament, encouraging and sanctioning the trade, could be enumerated." Walsh's Appeal, 326, 327.

<sup>4</sup> Beverley's Virginia, 35. 1 Banc. 177.

<sup>5</sup> 1 Hutch. Hist., 3d ed. p. 393. See *post*, ch. vi. In Josselyn's Voyage, 1638,

the other New-England colonies at that period was undoubtedly the same on this subject. The Dutch records allude to the existence of slavery in the settlements on the Hudson in 1626, or even at the first settlement of the colony of New Amsterdam, and in those on the Delaware in 1639.<sup>1</sup> From the legislation of the Carolinas, it seems that negroes were held in them as slaves from the earliest period of their settlement.<sup>2</sup> But it is probable that, in all the colonies, Indians taken in war, were held as slaves before any negroes were imported from Africa. Slave-holding was not permitted in Georgia before the year 1747.<sup>3</sup>

§ 201. Whatever sanction may have been given to slavery in any of its legal aspects, by subsequent statutes of the British Parliament, royal ordinances, or colonial legislation, such acts of strictly positive legislation could have had no effect upon the condition of persons in the colonies at the time of the first introduction of African and Indian slaves. It is, however, a clear deduction from the elementary legal principles which have been hereinbefore set forth, that the chattel-slavery of heathen Africans and Indians was lawful at this time in all the colonies, and properly received judicial recognition and support in international and municipal (internal) private law. This lawfulness is not here stated as the result of a custom, the inception of which is here described, or as being proved by subsequent long-continued acquiescence, but as being, at the time of such inception, the effect of established principles, judicially recognized in all countries, having the authority of that jurisprudence which among all nations is taken to be the foundation of the far greater portion of legal rights and obligations. It was judicially regarded as resting on natural reason indicated in the *law of nations* historically known at that

negroes are mentioned as being held in slavery at Noddle's Island in Boston harbor. See Mass. Hist. Coll., vol. 3, p. 231.

<sup>1</sup> Moulton's Hist. N. Y., vol. 1, part 2, p. 873. 1 Hildr. 441. 2 Banc. 303. The Dutch W. I. Company agreed to furnish the colony of New Netherlands with as many blacks as they conveniently could. 1 Broadhead, p. 196. Bettie's essay in Mem. Penn. Hist. Soc., vol. 1. Hazard's Annals of Pennsylvania. Albany Records. No mention is made of negroes in Campanius's account of the Danish colony of New Sweden.

<sup>2</sup> A cargo of negroes from Barbadoes brought by Sir John Yeomans, in 1671. 2 Banc. 170.

<sup>3</sup> Stevens' Hist. of Georgia, p. 312.

period—the common law of the world<sup>1</sup>—applied in international and in municipal<sup>2</sup> law because indicating the will of the supreme source of law having the territorial jurisdiction, whenever not disallowed by some more direct exposition of that will.<sup>3</sup>

§ 202. On the same principle by which the historical *law of nations* was received in supporting the slavery of foreign Africans, that is, that of being an indication of natural reason supposed to be accepted by the supreme power of the state, the same doctrines of the *law of nations*, or universal jurisprudence, must be held to have obtained with legal effect in interpreting the legislative enactments of the supreme power and the personal extent of the charter provisions operating as private law.

<sup>1</sup> The existence of a *jus gentium*, or historical *law of nations*, operating as *private law*, must be admitted in construing statements like this of Taney, *Ch. J.*, in *Dred Scott's case*, 19 Howard, R. 407: “They [negroes] had for more than a century before, [the time of the Declaration of Independence and of the adoption of the Constitution of the U. S.,] been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, &c.” It is not necessary to suppose the learned Chief Justice to intend saying that a negro who had never been a slave, or who had been legally manumitted, had no rights, &c., so that it was everywhere lawful for any white man to seize such a one and treat him as an article of property. The *law of nations*, as set forth in the preceding chapters, never embraced such a doctrine. If his meaning is that a *sovereign state*, having jurisdiction over the person of a negro, was not bound to respect in him any rights—the same may as truly be said of any white man: any ethical distinction that may exist cannot affect the matter.

<sup>2</sup> With the use of the term *law of nations* in the text, contrast that given to it in *Neal v. Farmer*, 9 Geo., R. 570, 571; where the court in asserting the legality of slavery independently of statute or the common law of England, ascribes it to “the law of nations” in the sense of public international law—a law of which nations are the subjects. On the other hand see Mr. Seward’s use of the *law of nature and of nations*, *ante*, p. 193, n. Such contradictions in the premises used by eminent jurists are here appealed to as vindicating the necessity of that discrimination of terms which was attempted in the first chapter.

<sup>3</sup> Granville Sharpe, in his *Tract on the Law of Nature*, London, 1777, p. 3, takes the *jus gentium* in respect to slavery as being contrary to the law of natural right recognized by the Roman law, quoting *Inst. I. Tit. III. § 2*. *Servitus est autem constitutio juris gentium qua quis dominio alieno contra naturam subicitur*. Bracton having repeated the same, *Lib. I., cap. 6*, and Fleta, *Lib. I., cap. 8*, they are, with Cowell’s *Institutes*, quoted by Sharpe as proving that slavery is contrary to the rule of natural reason received in the common law. The *method* followed by this writer to prove a doctrine of the common law of England, is the same as that which is indicated in this chapter and the preceding. But the law of natural reason on this point, deducible from the *Institute*, is precisely the reverse of that for which he refers to it, as has been shown in the preceding chapter.

The doctrine supporting chattel-slavery must be held to have limited the extent of the term "colonists," where used in the charters to describe the subjects of privilege and guarantee, to legal persons as distinguished from slaves; even if it did not go farther and confine the term to whites, or persons of the European race, to the exclusion of Africans and Indians, whether bond or free.<sup>1</sup>

§ 203. It has been shown, in the third chapter, that, where the guarantee of common law rights did not apply to determine the relations and rights of private persons, the power of sovereignty to affect such relations and rights must have been divided between the local government of each colony and the imperial government; that the limits of each were, unavoidably, always undetermined; but that, admitting the rights and obligations of the colonists in internal relations (relations between persons regarded as domiciled inhabitants) to have been essentially within the powers of the local governments, yet such as were incident to relations of commerce and international intercourse must have been, to the greater extent, within the general control of the parliament and crown of England.\* There does not appear to have been any act of positive legislation, proceeding from the imperial authority, which determined the condition of Africans or Indians within the colonies, considered either as alien or domiciled persons. There are statutes, however, which, being interpreted by the "usage and custom of merchants" as prevailing at that time, have always been held to support sla-

<sup>1</sup> Compare the language of the Supreme Court of Pennsylvania in *Hobbs v. Fogg*, 6 Watts' R. 558-560, when limiting the personal extent of the term *freeman*.

<sup>2</sup> See *ante*, § 131. To this power may be referred the frequent rejection of colonial laws restricting the introduction of African slaves. *Davis v. Curry*, 1810. 2 Bibb's Rep. (Ky.) 238—By the Court: "Slavery, it is believed, was introduced into the colonies by the regulation of the mother country, of which the courts in all the colonies were equally bound to take notice, in the same manner as the courts of the several states are now bound to take notice of any regulation of the general government; and what the courts of the colonies were bound to take notice, judicially, we must still be presumed to know, if not as matter of law, at least as matter of history." Though the condition of slavery in the colonies may not have been created by the imperial legislature, yet it may be said with truth, that the colonies were compelled to receive African slaves by the home government. See Brougham's Col. Pol., B. II., § 1. 3 Banc. 411. Stevens' Georgia 285. 2 Tucker's Bl. app. II. Madison Papers, III., 1390. Walsh's Appeal, 310-319. Lord Stowell in 2 Hagg. Ad. R. 109.



very in the colonies, if not in England ; their effect being however mainly to recognize property in negroes when on the high seas in British vessels, and before they could, as natural persons, be considered the domiciled inhabitants of any of the British dominions. The just effect of these statutes in this respect is derived from the view herein before given of the *law of nations*, and its effect in international and municipal (internal) law.<sup>1</sup>

§ 204. If undetermined by imperial statutes or by the charter provision, the condition or status of the African or Indian, when regarded either as a natural person within the territorial limits of a colony or as the property of a legal person domiciled within those limits, would depend upon the powers vested in the local or colonial government, as being one of the subjects of its proper jurisdiction. The law derived from the exercise of this power would be known either from positive legislation or from a judicial application of natural reason, in the manner indicated in the first chapter. Principles thus judicially applied would form a part of the common law prevailing in and for the colony. It was an admitted principle of the colonial system, or of the public law of the Empire, that the colonial courts, in determining the rules having this character, were independent of the courts of common law in England. Their decisions were reviewable, if at all, only by the king in council.<sup>2</sup> Common

<sup>1</sup> See *ante*, § 176. Burge's Comm. vol. 1, p. 737, n. ; "The following are among the numerous acts by which the British legislature encouraged the African slave trade and sanctioned slavery in her colonies :—Royal charters of Cha. 2, in 1664 and 1672, 9 and 10 Wm. 3, c. 26. The 6 Anne, c. 37, § 18, subjects captains of his majesty's ships of war, arriving at any of the harbors of the colonies, "to the good and necessary laws in force there for the preventing the carrying off from the said colonies any servant or slave, without the consent of the owner, and to the penalties and forfeitures declared by such laws." 10 Anne, c. 27. The Queen's speech to Parliament in June, 1712. 23 Geo. 2, c. 31. 25 Geo. 2, c. 40. 4 Geo. 3, c. 20. 5 Geo. 3, c. 44. 23 Geo. 3, c. 65. 27 Geo. 3, c. 27. The proceedings of the House of Commons from 1707 to 1713. Acts encouraging loans to the proprietors in the West Indies from British subjects and foreigners. 5 Geo. 2, c. 7. 13 Geo. 3, c. 14. 14 Geo. 3, c. 79. 1 and 2 Geo. 4, c. 51. 3 Geo. 4, c. 47. 5 Geo. 4, c. 113, § 37. 59 Geo. 3, c. 120, for the registration of slaves. The act of the legislature of Pennsylvania, 7 June, 1712, to prevent importation of negroes and Indians into that province, was disallowed by Great Britain and accordingly repealed by act of Queen Anne, 20th Feb. 1718.—1760, South Carolina passed an act to prevent the further importation of slaves, but Great Britain disallowed the act and sent a circular to all the other governors, prohibiting them from assenting to any similar act."

<sup>2</sup> Story's Comm. §§ 163, 175, 176, and citations.



law had therefore in each colony a several growth or progressive formation, as it had in England, and if the personal guarantee of rights, according to the law of England, did not apply to the negro or Indian inhabitant, there was no necessity that the rules judicially derived to determine their condition, as domiciled subjects under their several judicatures, should be the same in England and in the colonies. It does not appear from any historical record that the question—whether a heathen negro or Indian slave became free on being converted to Christianity, or on receiving baptism—was ever discussed before the colonial courts.<sup>1</sup> It is certain that slaves so converted or baptised and their issue, born in the colonies, and therefore, it would seem, nominally Christian, were usually retained in slavery and bought and sold, either as bondmen or as chattels, and that the right of ownership in such slaves must constantly have received judicial recognition before the existence of any colonial statutes determining their condition. It seems impossible now to ascertain whether the courts regarded the slave, after conversion, as still a *chattel*, or as a *legal person* held to bondage for life. The different colonial judicatures may, very probably, have had different views on this point. In determining the application of natural reason to the circumstances of converted or baptised slaves and their issue, they undoubtedly referred to the usage and practice of other nations, in reference to the same class of persons. Under this reference, if they regarded slaves as legal persons, capable of contracting legal marriages, they may have held that the condition of the issue followed that of the parents,

<sup>1</sup> There are however many colonial statutes which show that the question had been mooted. See *post* ch. vi. Mr. Bancroft, *Hist. U. S.*, iii. 409, says—"From New England to Carolina, the 'notion' prevailed, that 'being baptized is inconsistent with a state of slavery;' and this early apprehension proved a main obstacle to the culture and conversion of these poor people." Citing Berkeley's Works, iii. 247.

The statute of Virginia, 1682, c. i., see *post* ch. vi., seems to recognize the existence of a principle of universal prevalence that a negro, Moor or mulatto slave, having been converted to Christianity, is no longer a chattel, and can only be considered as a servant bound for years, on an equality of status with European imported servants; and that such person can be a slave only by force of some statute or *local custom*—*jus proprium*. It declares that "by the laws of *this country*" the conversion "doth not manumit them or set them free," but that, if introduced after conversion, the master or owner would be obliged "to depart from their just right and title to such slave and sell him for no longer time than the English," &c., &c.

where both were slaves ; and that, in the case of mixed marriages and of births out of wedlock, the civil law rule—*partus ventrem sequatur*—obtained, irrespectively of the rules of condition by descent derived from the customary law of England. [It is however probable that the chattel character was generally ascribed to the captived slave, and that the rule of descent derived from the civil law was judicially received, in all cases, to determine both the condition of the issue and the right of ownership in the offspring of slaves of different masters.] The law arising from the judicial determination of these points, having never been questioned under the royal right of supervision, created a common law in and for the colony, and was, independently of statutes, a sanction for slavery, even though this judicial application of common law may have differed widely from the doctrine sustained by the English courts of law : though, as has been shown in the previous chapter, it is very questionable whether the doctrine contemporaneously received in England, during the period which elapsed between the introduction of heathen slaves and the existence of local customary

<sup>1</sup> The rule of the Roman law—determining the condition of the issue by that of the mother—applied only when there was no legal marriage. Dig. L. I. t. 5, § 24; *ex naturæ hæc est ut qui nascitur sine legitimo matrimonio matrem sequatur, nisi lex specialis aliud inducit*. Blackstone II. 94, says—"But no bastard can be born a villein," citing Co. Litt. § 188; but this is probably incorrect, see the note on Coke by Hargrave and Butler, and in *Mirroure* c. 2, s. 28;—"Those are villeins who are born of a freeman and a neif, and born out of matrimony." The rule applied where either parent was a chattel slave, because, not being legal persons, the legal relation of marriage could not exist, and also because the issue of a female slave was regarded as the natural increase of a chattel: see Heinec. Jur. Nat. et Gent., L. ii. § 81. If the Roman law contained any rule determining the condition of those born in wedlock, it was that the child should be of the father's condition. The Roman law knew no slaves but such as were chattels; but under the feudal codes the bondman and bondwoman were legal persons; the issue therefore was not regarded merely as the increase of property, and though they followed the condition of their parents, yet, with some Germanic or Gothic nations, the children of serfs belonging to different feudal lords, were divided by an "*alterna vernarum partitio*." Heinec. *u. s.* note. Where the parents were of different conditions the issue generally followed that of the father as in the English law: Bla. ii. 94, Co. Litt. § 187, and notes; though a rule of alternation as between the children of a neif and a freeman prevailed in some parts, see *Manvill*, lib. 5, c. 6; and the same general rule seems, from Littleton and Houard, to have been Norman law, though Barrington on Stat. p 249, *u.*, supposes the rule in France to have followed the civil law, citing the proverb—*La verge annoblist et la vovre affranchist*. The phrase—*partus sequitur ventrem* is not, I believe, to be found in the *Corpus Juris*, and probably originated with the modern civilians. But the point to be noticed is, that the condition of the issue of legal persons in bondage, whether born in wedlock or not, depended on a local law or custom,—*jus proprium*, not *jus gentium*. Compare Fortescue de Laud. c. 42.

and statute laws establishing slavery, was different from that of the colonial courts. And however far the colonial courts may have been bound by the local law of England, as ascertained at the time of the first exercise of their judicial power, they were not held to modify the common law, as it had thus grown up under their own exposition and acquired a local character, by following the later English decisions.

§ 205. Thus the condition of slavery, if unknown to the law of England, nevertheless became established under the common law of the several colonies; which however, being a local law only, was entirely distinct, in its origin and authority, and in its territorial and personal extent, from that common law which was national, in those attributes, and which was, in each part of the Empire, the common measure of the personal rights of the English-born subject and his descendants. The colonial Governments appear to have exercised, without question, an unlimited control over the condition of such persons of the African and Indian races as were domiciled inhabitants of their several territories; that is to say, their legislation, in respect to such persons, does not appear to have been at any time restricted by any of the charter provisions.<sup>1</sup> The legislation of the several colonies in reference to slaves will be collected in the next chapter: but under the view which has been herein taken it is not necessary to cite it in this place as establishing chattel slavery. It will be seen that, in the statutes of each colony, slavery is viewed as an existing institution of law.<sup>2</sup>

<sup>1</sup> This point will be farther considered in the commencement of the next chapter.

<sup>2</sup> *Seville v. Chretien*, (1817,) 5 Martin's Louisiana R. 275. "It is an admitted principle, that slavery has been permitted and tolerated in all the colonies established in America by the mother country. Not only of Africans, but also of Indians. No legislative act of the colonies can be found in relation to it."

Connecticut Revised Laws of 1821; Title 98, *Slavery*; note—"Slavery was never directly established by statute; but has been indirectly sanctioned by various statutes, and frequently recognized by courts, so that it may be said to have been established by law."

"By custom or statute, whether legal or illegal, slavery existed [A. D. 1750] as a fact in every one of the Anglo-American colonies," 2 Hild. 419, which see also for a summary of the condition and numbers of slaves at that time.

Even in Georgia, where until the year 1749 (see Stevens' History of Ga. 285, 312) it was not permitted, it is held not to have been introduced by positive legislation. By the Court, in *Neal v. Farmer*, (1851,) 9 Geo. R. 580, it is said—"The title to a slave in Georgia now and under the colonial government is not and was not derived

§ 206. According to the definitions given in the first chapter, legal relations can exist only as the effects of some law,—some rule identified with the juridical will of the state. A natural person held in chattel bondage cannot acquire individual or relative rights, except under such law or juridical will; to be ascertained from positive legislation or by the judicial application of natural reason. It is by the recognition of universal jurisprudence or the *law of nations*, under this judicial action, that the act of the master renouncing his right in respect to the slave, or setting him free from his bondage, has been held, wherever chattel slavery has been known, to invest the natural persons so set free or manumitted, with individual rights and a capacity for relative rights. Manumission, that is, the legal consequence of the master's act, and the condition of a libertinus or freed person, is, in the Institutes, ascribed to the *jus gentium*.<sup>1</sup> During the earlier centuries of the Roman Empire, three conditions were recognized among the Libertini or Freedmen; all, however, inferior to that of the Ingenuus or free-born. But the descendants of a libertinus were not distinguished from other free born persons. Justinian not only

from positive law. The faculty of holding slaves was derived from the Trustees of the Colony acting under authority of the British crown, as a *civil* right in 1751, by an ordinance of that board. Before that time their introduction was prohibited. The regulation of slave property is as much the province of municipal law as the regulation of any other property and its protection equally its obligation: but we deny that property in slaves and the title by which they are held, are creatures of statutory law." It is not very clear what meaning is to be attached to the term "a civil right;" how the right can have been derived from the Trustees and yet not have originated in positive law, i. e. legislation. The idea is that before 1751, the colonists of Georgia were under a disability inflicted by the policy of the imperial Government, (see § 575 of the report,) in acquiring a certain kind of *property*, or from enjoying their individual right to acquire property, in the same degree as others;—which disability was removed by the administrative regulation or ordinance of the Trustees. Whether important results which might follow a general recognition of the doctrine that at the present day slavery is a *constitutio juris gentium* were considered in this decision, does not appear. The question actually before the court was whether the owner could recover from the slayer the value of a slave killed by him, without first suing him to conviction in a criminal court.

<sup>1</sup> Inst. Lib. I. tit. 5, *proœm.* (*ante* p. 150,) and Dig. Lib. I. tit. 1, § 4. The state having jurisdiction of the person who is held as a slave, may, of course, set him free by its legislative power. This will be the effect of a *jus proprium*: but, the resulting condition or status will be *jus gentium* in this case, as where the manumission was the master's act. It will therefore be afterwards judicially recognized everywhere; unless some local law, *jus proprium*, forbids it. The importance of this distinction can only be shown in the application of private international law.

abolished this distinction among the *libertini*, but also made all free persons (*libertos*) citizens of Rome, abolishing all legal difference between the status of the enfranchised (*libertini*) and the free born, (*ingenui*.) From the recital in the enactment, it appears that the first, if not the second also, of these changes was a return to the ancient usage of the Republic.<sup>1</sup> The rule of the Roman Imperial law, as the exposition of a universal jurisprudence, received judicial recognition in the American colonies.<sup>2</sup>

§ 207. If the *law of nations* has in modern times, or had during the colonial period, a limited personal extent or was different in its application to different races of men only while distinguishing between mankind as either bond or free—either chattels or persons, the necessary inference would be, that on

<sup>1</sup> Inst. Lib. I. tit. 5, § 8; *De libertinorum divisione sublata*; and Cod. 7, tit. 5, l. 1, tit. 6, l. 2. Smith's Dict. antiq. voc.—*Ingenus, Libertus*. Mr. Justice Daniel, in 19 Howard, p. 477, Dred Scott's case, appears to have adopted Cooper's version of the Institutes, in which *ingenuus* is mistranslated *freeman*. For the changes in the Roman law on these points, according to the latest researches, see The New Englander, Aug. 1857, in an article on Judge Daniel's statement of them; by President Woolsey, of Yale College.

<sup>2</sup> To some it may seem a singular refinement to suppose juridical authority necessary in ascribing individual (absolute) rights to the slave, when the master relinquishes his legal claims. But, if legal rights exist by the ascertained will of the state, (*ante* § 21 and p. 37, n. 1,) how otherwise can a chattel or thing become invested with them? Other chattels, when derelict by the owner, are still chattels, and belong to whoever may then first take possession of them. The doctrine of manumission, as explained in the Institutes, shows that even in the Roman law the slave was only "*instar rerum*," (*ante* p. 153, n. 1,) and that a personality independent of positive law was recognised to exist, as by a condition of things, or a law in the *secondary sense*, (*ante* §§ 1, 2,) or a law of nature in *that sense*, which became manifest in the possession of individual rights whenever the antagonistic right of the master was relinquished. See Inst. Lib. 1, tit. 5. *De Libertinis. Definitio et origo libertinorum et manumissionis*. The reasoning of Mr. Justice Daniel in Dred Scott's case, 19 Howard, p. 480, ignores the fact that the consequences of the master's act of manumission were *jure gentium*, and therefore *judicially* recognized everywhere, unless such recognition had been forbidden by some *jus proprium* of the forum. His language is—"The master might abdicate or abandon his interest or ownership in his property, but his act would be a mere abandonment. It seems to involve an absurdity to impute to it the investiture of rights which the sovereignty alone had power to impart," &c. The question in the case was of the rights of *citizenship*; but the Judge's argument applies equally against the acquisition of any personal right on manumission. Undoubtedly, the investiture rests on the sovereignty, not on the private master. But the *tribunal* finds the will of that sovereignty in the *jus gentium*, if there is no *jus proprium*,—local statute or customary law. In some countries, wherein serfdom existed under a law of local origin, the Roman law of manumission has not been applicable. Bodin, in Repub. B. i. c. 5, Knolle's Tr. p. 41, after stating the Roman law—"which law, for all that, we use not; for in this realm [France] he must of necessity obtain the prince his letters patents, which have always used to restore unto manumised men and of servile condition, the state of freeborn men, and to blot out all stain of their old slavery."

passing out of the chattel or bond condition, the subsequent condition of the emancipated African or Indian would be determined by the same principles which regulated the condition of other persons in the same jurisdiction. But though the law which in any colony determined the condition of the enfranchised African or Indian may have, in its effects, been similar to that determining the condition of the colonists of English birth or descent, it was not the same law either in its political foundation or in its territorial and personal extent. The fact of emancipation did not of itself place the African or Indian within the pale of the law applying to the English colonist, at least not so far as it was a law resting, as was before shown, upon a national as well as a provincial authority. The condition of the free African or Indian was determined by statutes proceeding from the colonial or from the imperial authority, according to the nature of the powers separately held by each under the public law of the empire, or by a judicial application under either colonial or imperial authority, of rules derived from natural reason. But the law so obtaining was always the local law of a colony in respect to its extent, and not a national law. When once recognized as a legal person, the law of England was indeed the exposition of a law of natural reason, judicially receivable in determining the private relations of the African or Indian subject, as well as those of the English colonist. But the basis of the rights of the former was not necessarily the same as that of the last. The law under which they existed had not, necessarily, the same national character, or the same territorial and personal extent. That was determined according to the public law, by a distinction of race or descent. The condition or status of the emancipated negro or free Indian was in none of the colonies equal, as a free condition, to that of the white colonist ; even where the law of the colony made no distinction in social relations between him and the white inhabitant. The public law took no notice of his rights, and the foundation of private rights in public law was an essential feature in the civil liberty of the English colonist. Whatever degree of liberty of action the negro or Indian might enjoy in practice,



his freedom was inferior to that of the white citizen in the nature of its guarantees.

§ 208. Thus, simultaneously with the establishment in this continent, by the colonists or by the national authority, of the law of status or condition for persons in England, to be the system of private municipal (internal) law, which, as a personal law, was to maintain the rights and liberties of the English colonists and their descendants, was established through like authority and with equally *jural* character, another department or system of laws ;—a system which, so far at least as it supported slavery or involuntary servitude, is commonly held at the present day to have always been contrary to that which prevailed as the territorial law of England. This system also had, in the several colonies, the character of a personal law in being applicable to a portion of the inhabitants who had no claim by birthright or inheritance to participate in the protection of the laws of England—the common law of the rights and liberties of Englishmen.<sup>1</sup>

<sup>1</sup> Sir W. Jones' Works, 4to., vol. III., p. 48. Charge to Grand Jury at Calcutta, June 9, 1792. "It is agreed by all who have coolly and impartially studied our noble constitution, as declared by many statutes from the Great Charter to the Bill of Rights, all which you know are solemn recognitions of our ancient public law, that three peculiar advantages are conferred by that sacred law on the *people of England* or on all subjects who are not noble, but may, if they please, be independent ; first a distinct, unalienable third share of the legislative power ; next a right, coupled with a duty, of keeping and using arms for the defence of their persons and habitations as well of their several counties, when the sheriff shall call for their aid ; thirdly, the right of being tried, when impleaded or accused, by their equals freely chosen, instead of appointed officers to whom they cannot except," p. 49—"and we may thence infer that if any acknowledged subjects of *Britain* (for a different faith or complexion can make no difference in justice and right) shall be tried, convicted and punished by a summary jurisdiction, however constituted, for petit larcenies, breaches of the peace, and other misdemeanors," &c. The law was certainly never so extended in the American colonies. In 1833, statutes in respect to India were proposed in Parliament, on a plan which should "effect a complete identification of Europeans and natives in the eye of the law, without regard to color, birth, or religion." 2 Kent, (3d ed.) p. 73 n. citing Ann. Reg. for 1833, p. 184, which see, and Lord Ellenborough's assertions, p. 186, of the impossibility of producing such effect. That the British Government, while conferring civil rights on slaves in India, did not "forcibly manumit" them, see H. St. G. Tucker's Memorials of Indian Gov. p. 434, Editor's note.

Forbes v. Cochran, (1824,) 2 Barn. & Cress. 463, Holroyd J. "Put the case of an uninhabited island, discovered and colonized by the subjects of this country ; the inhabitants would be protected and governed by the laws of this country. In the case of a conquered country, indeed, the old laws would prevail until altered by the king in council ; but in the case of the newly discovered country, freedom would be as much the inheritance of the inhabitants and their children as if they were treading on the soil of England." The correctness of this proposition at any particular period, (if in-



§ 209. But under the classification given in this chapter<sup>1</sup> persons within the colonies whose legal condition was not determined by the common law of England as a personal law by reason of birth in the realm of Great Britain, or their descent from ancestors of English birth, another description of aliens to the British empire is included; viz., persons of European or Caucasian<sup>2</sup> race, the subjects of those states which, by the supposed possession of superior knowledge and power, are known in international law as civilized states; the authors and expositors of universal jurisprudence or the *law of nations*, herein before described as a judicial rule, and the authors and subjects of that rule of action which, though not having the force of *law* for such states, is herein called international law. The condition of these persons, when appearing as aliens within the dominion of the British empire would be determined by private international law, derived from legislation and judicial exposition of the rules of natural reason, until they should have acquired a domicil, as that term is understood in international law; when they would become the subjects of that which is called, in contradistinction, municipal, or more properly, internal or local law. The chattel slavery of whites or Europeans as the property of legal persons, having long before become unknown under the various systems of municipal (national) law in Europe, all aliens of this description appeared within the colonies as legal persons, whose rights, such, while they remained aliens, or, at least, while they only sustained relations incident to foreign commerce or to war, could fall under the scope of the imperial authority, according to the division of power which was herein before stated as the public law of the empire.<sup>3</sup> Upon their becoming domiciled inhabitants of a colony, their relations, as persons, to the rest of the community, would have been subject to provincial and na-

added to include persons not of English birth or descent,) will depend upon the rules which may at that time be recognized in the English courts as being universal in their extent, and upon the *jus gentium* then recognized in English jurisprudence.

<sup>1</sup> § 195.

<sup>2</sup> Although there are manifest objections to the use of this term, it is here adopted having a tolerably well defined meaning, in connection with this subject. "Æthiopian and Caucasian races."—1 Banc. 177. 2 same, 464.

<sup>3</sup> *Ante*, § 131.

tional authority in the same manner as those of the English-born colonists. In most, if not in all the charters, provision was made that the colonists of other European nations than the English should participate in the privileges of those of English birth, and acts of naturalization were passed at different times, by the imperial and colonial authorities, placing the European alien upon an equal footing of privilege with the English ; requiring, of course, the profession of allegiance to the crown and to the government of the colony.<sup>1</sup>

§ 210. Under the system of colonization adopted by the European states possessing territory in North America, there also existed another kind of bondage, differing from slavery in its origin and extent, being, strictly speaking, founded on municipal law alone, (*jus civile* or *proprium*.) This species of servitude became obsolete about the time of the war of the revolution, and now is of importance only as casting some light on the legal nature of a free condition and absolute slavery during the colonial period. A portion of the white settlers in all the colonies were those known as indentured servants or redemptioners, who were English or other Europeans, bound to personal service, without wages, different from any known in England, but analogous to that of minor apprentices.<sup>2</sup> Such persons were recognized in the colonial legislation as a distinct class among those held to enforced servitude, though many of the statutes respecting them applied to slaves also.

The service of persons of this class might either have been involuntary from its commencement, or have originated in their own consent ; some having bound themselves to serve in the plantations during a certain number of years, in return for the expenses of their transportation and support. The servitude of others was the penalty of crime committed in the mother country,

<sup>1</sup> As to the interpretation of these acts of legislation by a reference to personal distinctions founded on the *law of nations*, see *ante* § 201.

That colonial acts of naturalization were of force only in and for the colony, see 1 Chal. Opinions, pp. 843-4. By the 18 Geo. 2, c. 7 (1740) "an act for naturalizing such foreign Protestants and others, therein mentioned, as are settled, or shall settle, in any of his Majesty's colonies in America." Such persons residing seven years, and taking the oaths, to be deemed natural born subjects.

<sup>2</sup> By the common law no person could be sent out of the kingdom against his will. 2 Co. Inst. 46 ; 1 Bla. Comm. 137 ; 2 Hawk. P. C., c. 83. Ordinary apprentices cannot be so sent out. *Coventry v. Woodall*, Hob. 134 ; 1 Brownl. pl. 67.

like that existing in the modern English penal colonies. Some were ordinary criminals or vagrants sent from English jails or workhouses, either in commutation of imprisonment or by virtue of some special statute.<sup>1</sup> The exportation of such persons continued for a long time to be an established part of British criminal discipline,<sup>2</sup> and when this class of indentured servants became the most numerous, their introduction was probably against the wishes of the colonists.<sup>3</sup> Many of the royalists taken prisoners by the parliamentary forces during the civil war<sup>4</sup>, and insurgents in Penruddock's and Monmouth's rebellion were also sent out to serve in the same condition. It may be supposed, from various publications of that day, that there were many instances in which persons were feloniously kidnapped in England and sold in the West Indian islands or America, either as servants for a term of years, or as slaves for life.<sup>5</sup>

As will appear from colonial statutes enumerated in the next chapter, the local governments assumed the power of subjecting free white persons to this condition, as a punishment for acts which were not so punishable either at common law or by any English statute.<sup>6</sup>

<sup>1</sup> Chalmers, Pol. Ann. p. 47, observes that the statute, 39 Eliz. c. 4, which enacted "that dangerous rogues might be banished out of the realm," was the only law which, in 1619, justified the infliction of expulsion as a punishment; but that the transportation of obnoxious persons to Virginia, at that time, was probably vindicated, by the administration, on "prerogative." By § 13 of 31 Car. 2, c. 2, (the Habeas Corpus Act,) persons contracting to be transported beyond seas are excepted from its provisions. By law of the Scottish Parliament, in 1671, against conventicles, recusants might be punished by banishment to the plantations. Hume, ch. 66. Some were probably sold as servants, to defray the cost of transportation. 4 Geo. I. c. 11, § 1, allows sentence of transportation to America, and empowers persons transporting convicts to assign their services. By § 5, merchants and others may contract with minors, above fifteen years, to serve not exceeding eight years in America. 6 Geo. 1, c. 38, and 4 Geo. 2, c. 11, provide for transportation of criminals to America. By 17 Geo. 2, c. 5, § 28, vagrants, whose settlement could not be found, might be sent to the plantations.

<sup>2</sup> There were such persons also in the Danish colony of New Sweden, see Campanius Holm, ch. vii. in Mem. of Pennsylv. Hist. Soc., vol. iii. 1st Part.

<sup>3</sup> 1 Hildr. 119; Walsh's Appeal, sec. ix.; *post* ch. vi., Virginia L. of 1670, Pennsylv. L. of 1722.

<sup>4</sup> Godwin's Commonwealth, III., 273; IV., 172.; Stevens' Georgia, p. 294; Walsh's Appeal, p. 38. For treatment of the Scots prisoners in Mass., see Hutch. Coll., 235.

<sup>5</sup> 2 Graham's Hist. 421, and note. 1 Hildr. 99, 193, 356, 509. 2 do., 268. 1 Banc. 175; 2 Banc. 251; 2 Elliot's N. E., p. 176.

<sup>6</sup> See *post* ch. vi. Maryl. Laws, 1663, c. 8; 1676, c. 2—marriage of white women with slaves. Conn. code of 1650—satisfaction of debts by servitude. Mass. L., March, 1632; 1 Mass. Records, pp. 246, 269, slavery mentioned as the punishment inflicted

§ 211. These servants or redemptioners were known in the colonies either as "indented servants," whose term of service was determined by their original contract, or by the penal sentence which subjected them to this condition, or as "servants sold for the custom;" those so designated being, probably, such as were brought into the colonies without any special sentence or contract, beyond the obligation incurred for the expense of their transport, to determine their term of service, which was fixed by colonial statutes according to circumstances of age and sex.<sup>1</sup>

The legal condition of these persons was essentially different from that of chattel slaves in its origin and duration; since it rested altogether on law of national origin,<sup>2</sup> (i. e. a *jus proprium*), and in the fact that the personality of the slave was recognized during its existence, and that it was limited to a specific time. But notwithstanding this difference and the fact that laws were enacted for their special protection recognizing them as legal persons, yet their general condition and disabilities, during its continuance, seem in many respects to have been the same, and much of the colonial legislation—that of some of the northern colonies at least—in reference to servants, applied both to such persons and to negro and Indian slaves. Some of these laws will be noticed hereafter in connection with the statutes relating to negro slaves.<sup>3</sup>

At the expiration of the fixed period of servitude, the indentured servant or redemptioner recovered, with his liberty, all the rights of a free person under the laws of England, and there was nothing to distinguish his condition in this respect from that of other free inhabitants of English descent, he being then equally entitled to the protection of that law throughout the British empire.<sup>4</sup>

on certain delinquents, (1638.) Order of the General Court, 1659, for the sale of Quakers.

<sup>1</sup> Compare *post*, ch. vi., Virginia Laws, from 1642 to 1660.

<sup>2</sup> Unless, when resting on a contract, it could have been held to be valid by universal jurisprudence or the *jus gentium*. But comp. *ante* p. 139, n. for the common law doctrine as to contracts for service.

<sup>3</sup> The English statute, 29 Geo. 2, c. 35, § 1, provides for enlisting indented servants in America.

<sup>4</sup> 2, Hildr. 1st ser., p. 428. In 1777, servants enlisted in the Continental army were

§ 212. It is not necessary to trace historically the changes by which the North American colonies, originally held by other nations than the English, became incorporated into the British empire, or the laws which prevailed therein, determining the condition of private persons before that period, or the legislative acts of the imperial government, by which the common law and statutes of England became extended over them, in the same manner and degree as over the colonies originally settled by the English. However much the rights of the white inhabitants of those colonies may have differed in their public or political character<sup>1</sup> from the *liberties* of the English colonists, they were substantially of the same character in their practical exercise in social relations. In all the colonies the same legal distinctions accompanied a difference of race or physical constitution, and upon the acquisition of those colonies by the British crown, the civil or social rights of the free inhabitants were secured to them, under the new sovereignty, on the transfer of their allegiance by international treaties.

declared freemen by the Congress, with the understanding that compensation was to be made to the masters, for loss of service, 3 Hildr. 190. The war stopped the importation of indented servants, and it was not revived to any great extent afterwards. Some Germans were imported about 1789: but Acts of Parliament prevented the indenting of laborers in England for transportation to America: 1 Hildr. 2d series, p. 98; 25 Geo. 3, c. 67, continued by later acts. In Walsh's Appeal, Pref. p. 29, the author speaks of vessels arriving at Philadelphia in 1816, 1817, "laden with redemptioners from the continent of Europe."

<sup>1</sup> Ch. XV. of Banc. U. S. In the Swedish colony of New Sweden the law rested entirely on the home sovereignty, except the police power. See Governor's commission in Mulford's Hist. of New Jersey, p. 86. O'Callaghan's Hist. of New Netherlands, vol. 1, p. 90: "The director-general and his council were invested with all powers, judicial, legislative and executive, subject, some supposed, to appeal to Holland; but the will of the Company, expressed in their instructions, or declared in their marine or military ordinances, was to be the law in New Netherland, excepting in cases not specially provided for, where the Roman law, the imperial statutes of Charles V., the edicts, resolutions and customs of Fatherland, were to be received as the paramount rule of action." P. 101: "The director and council had supreme, executive, and legislative authority in the colony." See also Moulton's Hist. of New York, vol. 1, part 2, p. 369, also B. F. Butler's Discourse on the Constitutional History of the State of N. Y., pp. 14, 15, 20.

## CHAPTER VI.

THE ESTABLISHMENT OF MUNICIPAL LAW IN THE COLONIES ;—  
THE SUBJECT CONTINUED. LOCAL LEGISLATION DETERMINING  
CONDITIONS OF FREEDOM OR OF BONDAGE.

§ 213. It has been attempted in the three preceding chapters to exhibit the origin and extent of positive<sup>1</sup> laws in the American colonies ; in doing which, it was necessary to regard those laws both as public and as private law ; that is, in other words, to consider both the location of the sovereign legislative or juridical power, which was the source and basis of the private law, and its actual effects upon the conditions of private persons within the colonial territory. As the introduction of that law, whether public or private, was dependent upon the external force and imperial authority of the crown and parliament of England, it was in those chapters considered mainly as the law of one nation ; irrespectively of those local distinctions which the separate powers of the several colonies, either independently of, or in co-operation with, the imperial authority, might each, in accordance with the public and national law, create within their respective domains. It is the law which thus originated in legislative or juridical power acting in and for the several colonies, as distinct and separate jurisdictions, which, in its effect upon conditions of freedom and its opposites, is the subject of this chapter.

<sup>1</sup> Meaning that law which was both internal and international, and commonly called *municipal*, but more properly *national* law, *ante*, § 53. From the peculiar distribution of legislative power which existed under the British Empire, the term *national*, if employed here, would be liable to misconstruction.

§ 214. The legislative power of the colonial government was, as has been shown, indirectly limited by the national guarantee of common law liberties to the colonists and their descendants. But they were also expressly restricted by the charter provision that their local legislation should not be repugnant or contrary to the laws of England, or should be agreeable or conformable, as nearly as might be, to the laws of England. The effect of this restriction as a protection to private individuals was not limited in the charters by any personal distinction expressed therein. But it appears, as has already been indicated in the third chapter, that in determining what laws would not be repugnant to, or would be agreeable to, the laws of England, the colonial assemblies or legislatures claimed and exercised with the sanction of the crown, an authority, in reference to matters of internal law, which, in the language of history, might "abrogate every part of the common law, except that which united the colonies to the parent state by the general ties of allegiance and dependency ;"<sup>1</sup> or that, as the colonial tribunals had a several power of interpreting and applying common law in their respective jurisdictions, they practically under the revisory power of the king in council, determined how far the territorial law of England was adapted to the situation of persons and things within the colonial jurisdiction and should control the creation of a local law. The existence of this power was illustrated in the colonial laws of descent of estates and in every department of private law. It appears therefore that the charter restriction above mentioned did not prevent the colonial legislative bodies from establishing, with the sanction of the local judicature, a rule of condition, in reference to persons not protected in the possession of individual and relative rights by the common law of England having personal extent, different from any known to that law and incompatible with the enjoyment of those rights.<sup>2</sup> Besides, as has been

<sup>1</sup> Story's Comm. § 163.

<sup>2</sup> A distinguished jurist of Virginia has said, "Local circumstances, likewise, gave early rise to a less justifiable departure from the principles of the common law in some of the colonies, in the establishment of slavery ; a measure not to be reconciled either to the principles of the law of nature, nor even to the most arbitrary establish-



shown in the fourth chapter, although the common law courts in England, at some point of time anterior to the independence of the colonies, decided that no person could by common law be held as a slave in England, yet such doctrine was by no means generally received during the seventeenth and the earlier part of the eighteenth century, and that, in fact, negro slaves were held and sold, as persons bound to involuntary servitude, if not as chattels, in England during that period ; and that it seems never to have been supposed during the period in which the colonial statutes establishing such conditions were enacted, that the slavery of Africans or Indians and their descendants in the colonial dependencies of the Empire was repugnant to, or not conformable or agreeable to, the law of England. And if the common law afterwards received from English tribunals a different construction, such a change could have had no effect upon colonial statutes which, at the time of enactment, were sanctioned by the contemporaneous exposition of the laws of England.

As will be more fully shown in the succeeding chapter, the later English cases which unqualifiedly deny the master's claim to service must be taken to mean that such claim could not be maintained because the territorial law attributed liberty to each person within the realm of England, and that they go no farther. However unlawful in England, at any time, there is not a judicial doubt on record that it might be lawful in the English colonies : its lawfulness in America is expressly asserted by Holt and Mansfield in the cases already cited.<sup>1</sup>

§ 215. It has been shown that the colonial Governments, in the exercise of any of their powers, were also indirectly limited by the national guarantee extending the rights and privi-

ments in the English government at that period ; absolute slavery, if it ever had existence in England, having been abolished long before. These instances show that the colonists, in judging of the applicability of the laws of the mother country to their own situations and circumstances, did not confine themselves to very strict and narrow limits." 1 Tucker's Blackstone, (1803,) p. 388.

<sup>1</sup> The English judges and the American jurists were agreed upon this point ; they disagreed only in deriving the law from different sources. Holt said—" for the laws of *England* do not extend to *Virginia* ; being a conquered country, their law is what the king pleases." See *ante*, p. 183 and note. The colonial governments ascribed the existence of slavery, in their respective territories, to their own juridical action.

leges of Englishmen' to colonists of English or European race, a principal one of which was certainly the right of property, or to its possession and enjoyment. The extent of the rights thus guaranteed, was unquestionably determined by common law.' But this common law could only be one which had a national authority and recognition, or which, in operating as a personal law, was the same in all parts of the Empire.' As has been shown, if the right of the master in respect to the slave had, in the several colonies, a common law character, or was not derived from legislative enactment, it was not therefore, necessarily, also a right protected by common law operating with national extent.' As has been shown in the preceding two chapters, this law during the later part of the colonial period at least, if not during the seventeenth century also, maintained slavery only in the case of heathen Africans and Indians: and, when Christianized or baptized, their condition depended upon the local law of that part of the Empire in which they were domiciled.

§ 216. Although the involuntary servitude of Indians and negroes in the several colonies originated under a law not promulgated by legislation, and rested upon prevalent views of universal jurisprudence, or the *law of nations*, supported by the express or implied authority of the home Government, yet it is evident, from the historical sketch of those views which has herein been given, that, when negroes and Indians became the permanent inhabitants of the colonial jurisdictions, and had become a portion of a Christian population by baptism or conversion, many doubts must have arisen in respect to their legal condition. Being also a condition entirely different from, and in marked contrariety to, any known to the personal law apply-

<sup>1</sup> *Ante*, § 180.

<sup>2</sup> *Ante*, §§ 187, 188.

<sup>3</sup> *Ante*, § 186.

<sup>4</sup> *Ante*, § 188. And it may be mentioned here, that the claim of a power in the colonial Governments to prohibit the introduction of heathen negro slaves from abroad, was one of the declared issues of the Revolution. Walsh's Appeal, p. 817, as was declared by Mr. Burke, in his speech on the conciliation with America. and that the Imperial refusal was never justified on the idea of securing to the colonists a common law right, but on avowed motives of national policy and the profits of British merchants. See Petition of H. of Burgesses, Va., April, 1772; 2 Tucker's Bl. App. p. 52; Jefferson's first draft of the declaration of Independence; preamble to Const. of Va., June 26, 1776, *post*; and *ante*, § 203, n.

ing to the European colonist, slavery could not long continue unnoticed in the local legislation, and enactments of very early date may be found in all the colonies, some recognizing, extending and modifying the rights and obligations which should accompany its existence, and others marking more distinctly that difference of privilege between the inhabitants of different races, whether bond or free, the origin of which has been already shown.<sup>1</sup>

§ 217. It is not intended to present this chapter as containing a complete catalogue or description of the various colonial enactments which might be taken to create or modify the opposite conditions of freedom and bondage. A very imperfect sketch or memorandum only of this legislation is here proposed; one which may show, in part, the recognition of the personal rights of the free inhabitants and the legislative support given to the condition of slavery and to the civil disabilities of persons of the African and Indian races: indicating, in some degree, the progress or decline of domestic slavery, as an element in the civil state, and the power exercised by the colonial Governments in varying those two systems of personal law, the nature and origin of which, as laws of condition or status, have been described. The civil or social relations produced by these laws, however interesting and important in a political and ethical point of view, form a subject of inquiry which is not included in that view of the law which is taken in this work; and the incidents of chattel slavery are, in their legal aspect, too simple and well known to require their elucidation in connection with the obvious bearing of the statutes themselves.<sup>2</sup>

<sup>1</sup> *Neale v. Farmer*, 9 Geo. R. 579; "It is theoretically, every where, and in Georgia, experimentally, true, that two races of men living together, one in the character of master, and the other in the character of slave, cannot be governed by the same laws."—Not meaning that the law which makes one the master is a different law from that which makes another the slave; but that, where slavery exists, the actions of the two classes must be judged by a different moral criterion: *e. g.* an act which, as to a freeman, is battery or murder, may not be such as to a slave. *State v. Hall*, 3 Hawks' R. 582. And compare the provisions of Roman law, Dig. lib. 47, tit. 10, § 15, l. 85–89.

<sup>2</sup> The discrimination, in the following abstracts, of particular enactments and legislative expressions has been made according to the author's view of their importance in connection with the succeeding portions of this work. Other very faithful descriptions of the colonial legislation, having especial reference to slavery, may be

And, though the location or investiture of the sovereign political power from which legislation may proceed is necessarily an important element in the quality of those conditions which are created by it, it will not here be attempted to describe the origin and mode of existence either of the several local Governments, or of the political *people* of each colony, that is, of that portion of the inhabitants which, by the elective franchise, exercised the powers of a body politic. These topics belong to public municipal law ; and the facts by which that law is manifested, or from which it was derived, must be sought in the works of historical writers. The general view of the comparative extent of the powers held by the colonies, or their organized Governments, for the creation of local private law, which has been given in the third chapter, may indicate the connection of that public law with the subject of this treatise. An account of the creation of the several colonial Governments, their political organization, territorial jurisdiction, and juridical action is given, with all essential minuteness, in Story's Commentaries, Book I ; and the fuller recital of the same facts by Mr. Bancroft, in his History of the United States, has peculiar value, in this connection, from the copious citation of the original authorities in the foot notes. To these authors the reader is particularly referred. Since however the possession by private persons of that right which is known as the *elective franchise* is, in popular States, an important characteristic of condition, and has a peculiar bearing on the questions of status hereinafter considered, the personal extent of that franchise, at different periods, will be noticed.

Since the colonial legislation applying to chattel slaves, is frequently combined with provisions relating to conditions of servitude in a more general sense, including the temporary bondage of persons under indenture, whether whites or negroes and Indians, the statutes respecting "servants" and "servitude" will be cited with those more strictly called "slave

found in Mr. Hildreth's History of the United States, first series. Mr. Stroud's sketch is hostile to slavery, but the view of the legal conditions existing under the customary and statute law of the different States, is indicated by extracts from many of the statutes and decisions here noted.

laws." Though detached portions of statutes cannot individually be supposed to give the full meaning of the enactment, yet, taken together, they may give a tolerably correct idea of the course of legislation. For convenience in reference, the legislation of each colony will be given separately ; in an order determined more by the connection in the legislative history of the different jurisdictions, than by the order of the dates at which their several local laws, as of distinct portions of the British Empire, may be taken to have originated,—Virginia, 1606 ; Maryland, 1632 ; Massachusetts, 1620 ; New Hampshire, 1679 ; Connecticut, 1636 ; Rhode Island, 1638 ; New York and New Jersey, 1664 ; Pennsylvania, 1680 ; Delaware, 1691 ; North Carolina and South Carolina, 1663 ; Georgia, 1732.

### § 218. LEGISLATION OF VIRGINIA.

The legislation of Virginia, affecting the condition of the Indian and negro races, constituted, probably, a precedent for that of the neighboring colonies and the newer southern States of the Union, and for that reason a further abstract of it is here presented. Where other authority is not mentioned, the citations are from Hening's edition of the statutes.

The recorded legislation of Virginia commences with the year 1619, when a legislative assembly was first convened.<sup>1</sup> In

<sup>1</sup> Mr. Bancroft, in the publication cited in the text, quotes from a MS. in his possession, entitled the "Briefe Declaration, &c.," of "the Ancient Planters," saying that from each plantation two deputies (Burgesses) were elected "by the Inhabitants thereof." It does not appear by what rule the inhabitants who should vote were discriminated.

The patent of 1606 did not restrict the legislative power of the governing councils by any reference to the laws of England. The 15th article provides,—“also we do for us, our heirs and successors, declare by these presents, that all and every the persons, being our subjects, which shall dwell and inhabit within every or any of the said several colonies and plantations, and every of their children, which shall happen to be born within any of the limits and precincts of the said several colonies and plantations, shall have and enjoy all liberties, franchises and immunities within any of our other dominions, to all intents and purposes as if they had been abiding and born within this, our realm of England, or any other of our said dominions.”

1 Hen. St. 57, Stith, app. I., p. 1. The King's "Articles, &c."—1 Hen. 74, provide for altering the ordinances of the local council—"so always as the same alterations may be such as may stand with and be in substance consonant to the laws of England, or the equity thereof;" and declare that the ordinances of the crown should be so consonant, and that those of the council in England should be "as near to the common laws of England and the equity thereof as may be." The royal ordinance, 1607—1 Hen. 78, limits the local councils "so as always none of the said acts \* \* be contrary to the laws and statutes in

the proceedings of this assembly, recently first published by Mr. Bancroft from documents obtained from England, in New York Hist. Soc. Coll., 2d series, vol. iii., there are several enactments respecting servants : p. 346, that an idler or runagate, though a freed man, may be appointed to serve a master for wages : p. 350, for the punishment of a certain servant, for ill conduct towards his master, by pillory and whipping : p. 352, servants forbidden to trade with Indians : p. 355, forbidding marriage of servants without consent of master or a magistrate, and regulating time of service in certain cases. There are other provisions restricting the intercourse of the colonists with the Indians.

**1630.**<sup>1</sup>—*Resolution*.—"Hugh Davis to be soundly whipped before an assembly of negroes and others, for abusing himself to the dishonor of God and the shame of Christians, by defiling his body in lying with a negro." 1 Hen. 146.

**1640.**—"Robert Sweet, to do penance in church, according to the laws of England, for getting a negroe woman with child, and the woman to be whipt."—1 Hen. 552.

**1642-3**, c. 21, 22.—Provisions relating to runaway servants and hired freemen : c. 26, how long servants brought over without indentures shall serve : c. 29, servitude for offences abolished : c. 40, forbids dealing with the servants or apprentices of others.—1 Hen. 253, 257, 259, 274.

this our realm of England, or in derogation of our prerogative royal." The patent of 1609, to the London Company, Art. 22, contains a guarantee similar to that in Sec. 15 of first patent, to "subjects which shall go and inhabit within the said colony, &c.," of the liberties of "free denizens and natural subjects within any other, &c." The 28d article limits the legislative powers of the councils,—“so always as the said statutes, ordinances, and proceedings, as near as conveniently may be, be agreeable to the laws, statutes, government and policy of our realm of this England.” (1 Hen. 96.) The patent of 1611 limits the legislative power, sec. 7, to laws, “not contrary to the laws and statutes of this our realm of England.” Sections 14 and 15 are remarkable for giving special powers to the council, to seize and punish various kinds of laborers for *wages* on their desertion.

Mr. Bancroft quotes from “Briefe Declaration, &c., statement that in 1619 the new governor, Sir Geo. Yeardley, under his instructions, given by the Company in England, proclaimed, “that those cruell lawes by which we had soe longe been governed, were now abrogated, and that we were to be governed by those free lawes which his Majerties subjectes live under in Englande.”

<sup>1</sup> 1 Hild. 208. “Orders were at the same time (1633) sent to Virginia for a good understanding between the two colonies, and that neither should entertain fugitives from the other.”

1649, c. 2.—Declares all imported male servants to be tithables.<sup>1</sup>

1654-5, c. 6.—*For indenturing Irish servants.* 1 Hen. 411.

1655-6, c. 1.—Indian children in families of colonists, not to be slaves.—1 Hen. 396.

1657, c. 85.—Provisions of 1654-5, c. 6, extended to all alien servants.—1 Hen. 471.

1657-8, c. 16.—Penalty for servants running away, and remedy for servants who may be misused : c. 18, courts to determine indenturing : c. 46, *What persons are tithable*—"all male servants hereafter imported into this colony, &c., liable to pay country levies, and all negroes imported whether male or female, and Indian servants male or female, however procured, being sixteen years of age, &c." (this act further explained by 1661-2, c. 54) : c. 48, transfers of the service of Indian children prohibited : c. 56, *noe collonie servants*—"that no person for anie offence already committed shall be adjudged to serve the collonie hereafter."

1659-60, c. 13.—Repeals act indenturing aliens in service (1657, c. 85,)—"that for the future, no servant coming into the country without indentures, of what Christian nation soever, shall serve longer than those of our owne country of like age : c. 15, an act for the pay of Dutch masters of vessels bringing in runaway servants (refers to articles of peace, lately concluded with the Dutch) : c. 16, encouraging importation of "negro slaves" by "the Dutch and other strangers."—1 Hen. 538, 539, 540.

1660.—Upon refusal of the Indians of a certain tribe to satisfy a certain award against them, so many of them as the court shall think fit shall be apprehended and sold into a foreign country.—2 Hen. 15.

<sup>1</sup> *Tithables* were persons assessed for a poll-tax, otherwise called the "country levies." At first, only free white persons were tithable. The law of 1645, c. 4, provided for a tax on property and tithable persons. By 1648, c. 6, property was released and taxes levied only on the tithables, at a specified poll-tax. Therefore by classing servants or slaves as tithables, the law attributes to them legal personality, or a membership in the social state, inconsistent with the condition of a chattel or property. That free whites above the age of sixteen years were tithables, in this sense of the word, see Beverley, p. 218 : laws of 1661-2, c. 54 ; 1738, c. 8, § 3, 1748, c. 21.



**1660**, c. 22, 1660-1, c. 10, 1661-2, c. 15, 98, 101, 102, 103, 104, 105.—Various provisions for punishment of runaway servants, mostly by extending their period of service ; for prevention of cruelty of masters, &c. : c. 15, entitled, *Burial of servants or others privately, prohibited* : c. 54, *What persons are tithable*.—2 Hen. 118.

**1661-2**, c. 138—Concerning Indians—(margin) “This act appears to be a digest of the former laws relating to the Indians which are very numerous.”—Enacts “that what Englishman trader or other shall bring in any Indians as servants, and shall assigne them over to any other, shall not sell them for slaves, nor for any longer time than English of the like ages should serve by act of assembly.”—2 Hen. 143. Injuries done them to be remedied by the laws of England, as if they had been done to an Englishman. See abstract in 1 Hildr. 515.

**1661-2**.—Reciting that a “Powhatan Indian sold for life time to one E. S., by the King of Wainoke Indians, who had no power to sell him, being of another nation, it is ordered that the said Indian be free, he speaking perfectly the English tongue and desiring baptism.”—2 Hen. 155.

**1661**. March.—“The Committees report that the great loss and damage sustained by Mr. William Dromond through the injustice done by the court of Boston in New-England ought to be repaired, and since the said court have returned no satisfactory answer to the letter of the honorable governor and council of Virginia, wee are necessitated to find the least of ill expedients to repair the said Mr. Dromond ; it is therefore ordered by this present grand assembly, there be seized to the value of fforty pounds sterling money, out of the estate of some persons relateing to the said government of Boston, which is in consideration of wages due for such a servant's time, as was illegally cleared from the said Dromond's employ in New-England, and doe accordingly order the same.” 2 Hen. 158.

**1662**. c. 12.—“Whereas some doubts have arisen whether children got by any Englishman upon a negro woman should be slave or free. *Be it*, &c., that all children borne in this country shall be held bond or free, only according to the condi-

tion of the mother:" By c. 13, women servants, whose common employment is working in the ground, are made tithable.

1663,<sup>1</sup> c. 8.—That runaways be pursued at the public expense, "and in case the said fugitives shall, notwithstanding such pursuit, make an escape to any of the Dutch plantations, it is enacted that letters be written to the respective governors of those plantations to make seizure of all such fugitive servants, &c."—2 Hen. 187.

1666. c. 9, 10.—Respecting servants' time, and runaways.—2 Hen. 239.

1667. c. 3.—"That the conferring of baptisme doth not alter the condition of the person as to his bondage or freedom, that divers masters, freed from this doubt, may more carefully endeavour the propagation of christianity, &c."—2 Hen. 260.

1669. c. 1. *An act about the casuall killing of slaves.*—"Whereas the only law in force for the punishment of refractory servants resisting their master, mistress, or overseer, cannot be inflicted upon negroes [*slaves* are here meant, because the law referred to—1661-2. c. 104—punishes such *servants* by extending their time], nor the obstinacy of many of them by other than violent means be suppressed. *Be it, &c.*, if any slave resist his master (or other by his master's order correcting him) and by the extremity of coercion should chance to die, that his death shall not be accounted felony, but the master (or that other person, &c.) be acquitted from molestation, since it cannot be presumed that prepensed malice (which alone makes murder felony) should induce any man to destroy his own estate. 2 Hen. 270.—Re-enacted 1705, c. 49. 1723. c. 4. 1748, c. 31. Repealed 1788, c. 23. v. 2, Tucker's Bla. app. 46.

1670. c. 3. *Election of Burgesses by whome.* "Whereas the usual way of chusing burgesses by the votes of all persons who haveing served their time are ffremen of this country, &c. &c., and whereas the lawes of England grant a voyce in such election, only souch as by their estates real or personall have inter-

<sup>1</sup> In this year an insurrection was plotted by a number of servants. See 2 Banc. 192.

est enough to bye them to the endeavour of the publique good,"—enacts that "none but ffreeholders and housekeepers" shall have votes. [Comp. law 1723, c. 4.]

— c. 5. "Whereas it has been questioned whether Indians or negroes, manumitted or otherwise free, could be capable of purchasing Christian servants, it is enacted that no negro or Indian, though baptized and enjoying their own freedom, shall be capable of any such purchase of Christians, but yet not debarred from buying any of their own nation : " c. 12, "whereas some disputes have arisen whether Indians taken in war by any other nation, and by that nation that taketh them sold to the English, are servants for life or term of years, it is resolved and enacted that all servants not being Christians, imported into this colony by shipping,<sup>1</sup> shall be slaves for their lives ; but what shall come by land shall serve, if boys or girls until thirty years of age, if men or women, twelve years and no longer." 2 Hen. 280, 283. 1670, ap. 20—extract from the records of the general court, 2 Hen. 509, Hist. Doc. *margin*—"Convicts (called 'jail birds') from the prisons in England, not permitted to be landed in Virginia."

1671. c. 7. "That any strangers desiring to make this country the place of their constant residence, may upon their petition to, &c., and taking the oaths &c. to his majesty, be permitted to a naturalization, &c. \* \* Provided that the benefit of such naturalization be confined and esteemed to extend only to the government of Virginia, beyond which this grand assembly pretend to noe authority of warranting its sufficiencie, &c." 2 Hen. 289.

1676. c. 1. (*Of Laws under Bacon's usurpation.*) *An act for carrying on warre against the barbarous Indians*—"That all Indians taken in warre be held and accounted slaves dureing life." 2 Hen. 346.

<sup>1</sup> *Shipping* seems to refer to negroes ; but it is supposed that about this time Indians were imported into New England and Virginia, as slaves, from the West Indies and the Spanish Main. 1 Hildreth Hist. 522.

Hist. Documents, 1670, 2 Hen. 515.—Enquiries to the Governor of Virginia, submitted by the Lords Commissioners, &c. By answers to questions 15 and 16, it appears that of 40,000 persons, there were 2,000 "*black slaves*, 600 *Christian servants*, and that the yearly immigration of servants was about 1,500, of which most are English, few Scotch, and fewer Irish, and not above two or three ships of negroes in seven years."

**1676—7.** 'Order that Indian captives taken by soldiers in war should be the property of such captors. 2 Hen. 404—and note and **1679**, c. 1; to the same effect 2 Hen. 432, 440.

**1680.** c. 2. *An act for naturalization by Governor, &c.* c. 7, *An act ascertaining the time when negroe children shall be tythable.* c. 8, *An act lycensing a free trade with the friendly Indians.* c. 10, *An act for preventing negroes insurrections.* "Whereas the frequent meeting of considerable numbers of negroe slaves under pretence of feasts and burials is judged of dangerous consequence,"—enacts that no negro or other slave shall carry arms or go from plantation without certificate, and if such "shall presume to lift up his hand in opposition against any Christian," shall be punished with thirty lashes. (See l. 1748, c. 38, § 20.) "That if any negro or other slave shall absent himself from his master's service and lye hid and lurking in obscure places, committing injuries to the inhabitants, and shall resist any person or persons that shall by lawful authority be employed to apprehend and take the said negroe, that then, in case of such resistance, it shall be lawful for such person or persons to kill the said negroe or slave soe lying out and resisting, &c. 2 Hen. 464, 480, 481, (continued, 1705, c. 49, sec. 37.)

**1682**, c. 1.—*An act to repeale a former law making Indians and others ffree.*—2 Hen. 490. Preamble, after reciting act of 1670, c. 12, "and for as much as many negroes, moores, molatoes, and others, borne of and in heathenish, idollatrous, pagan, and Mahometan parentage and country, have heretofore and hereafter may be purchased, procured, or otherwise obtained, as slaves, of, from, or out of such their heathenish country, by some well-disposed Christian, who, after such their obtaining and purchasing such negroe, moor, or molatto as their slave, out of a pious zeale have wrought the conversion of such slave to the Christian faith, which by the laws of this country doth not manumit them or make them free, and afterwards such their conversion, it hath and may often happen that such

<sup>1</sup> The third charter, so called, of Virginia is dated October 10, 1676. The most important clause in connection with the subject is—"declare and grant that all the subjects of us, our heirs and successors from time to time inhabiting within our colony and plantation of Virginia, shall have their immediate dependence upon the Crown of England, under the rule, &c. 2 Hen. 582.

master or owner of such slave being by some reason inforced to bring or send such slave into this country to sell or dispose of for his necessity or advantage, he, the said master or owner of such servant, which, notwithstanding his conversion, is really his slave, or his factor or agent must be constrained either to carry back or export againe the said slave to some other place where they may sell him for a slave or else depart from their just right and tytle to such slave, and sell him here for noe longer time than the English or other Christians are to serve, to the great losse and damage of such master or owner, and to the great discouragement of bringing in such slaves for the future, and to noe advantage at all to the planter or buyer ; and whereas alsoe those Indians that are taken in warre or otherwise by our neighbouring Indians, confederates or tributaries to his majestie and this his plantation of Virginia, are slaves to the said neighbouring Indians that soe take them, and by them are likewise sold to his majesties subjects here, as slaves. Bee it therefore enacted by the governour, councell, and burgesses of this general assembly, and it is enacted by the authority aforesaid, that all the said recited act of the third of October, 1670, be and is hereby repealed and made utterly voyd to all intents and purposes whatsoever. And be it further enacted by the authority aforesaid, that all servants except Turkes and Moores, whilst in amity with his majesty, which from and after publication of this act shall be brought or imported into this country either by sea or land, whether negroes, Moors, mollatoes or Indians, who and whose parentage and native country are not Christian at the time of their first purchase of such servant by some Christian, though afterwards and before such their importation and bringing into this country, they shall be converted to the Christian faith ; and all Indians which shall hereafter be sold by our neighbouring Indians, or any other trafiqueing with us, as for slaves, are hereby adjudged, deemed, and taken, and shall be adjudged, deemed, and taken to be slaves, to all intents and purposes, any law, usage, or custome to the contrary notwithstanding." This provision, re-enacted in nearly the same terms in the revisions of 1705. c. 49, § 4. 1753, c. 2.

**1682, c. 2.**—*An act declaring Indian women servants tithables.*—Whereas it hath been doubted whether Indian women servants sold to the English above the age of sixteene yeares be tythable. *Be it, &c.*, that all Indian women are and shall be tythables, and ought to pay levies in like manner as negroe women brought into this country doe and ought to pay.

**1682, c. 3.**—*An additional act for the better preventing insurrections by negroes.*—2 Hen. 490, 492.

**1684, c. 3.**—“An act repealing act concerning the pursuit of runawayes” (1663, c. 8), because found “by experience to be inconveniente.”—3 Hen. 12.

**1691, c. 9.**—*An act for a free trade with Indians.*—(Henning's note.)—“This act was re-enacted in the revisal of 1705, and again in the edition of 1733, in which last it forms sect. 12, of ch. 52. This is the same law on which the old general court first founded their decision, that the right of making slaves of Indians was taken away; though at that time it had not been discovered that the act existed as far back as 1691. The Supreme Court of Appeals have since extended the principle to cases where Indians were brought in between 1691 and 1705.”

**c. 16.**—*An act for suppressing outlying slaves.*—That such slaves shall be arrested by the sheriff or a justice's warrant; that in case of resistance, &c., “in such cases it shall and may be lawfull for such person or persons to kill and distroy such negroes, mulattoes, and other slave or slaves by gunn or any otherwaise whatsoever.” Compensation to be made to master in such case. “And for prevention of that abominable mixture and spurious issue, which hereafter may encrease in this dominion, as well by negroes, mulattoes, and Indians intermarrying with English or other white women, as by their unlawful accompanying with one another. *Be it, &c.*, That for the time to come whatsoever English or other white man or woman being free shall intermarry with a negroe, mulatto, or Indian man or woman, bond or free, shall within three months after such mar-

<sup>1</sup> See *Hudgins v. Wrights*, 1 Hen. and Munford's R. p. 139; *Pallas and oth. v. Hill and oth.* 2 do. p. 149; *Butt v. Rachel*, 4 Munford's R. p. 209; also, 1 Hen. Stat. Pref. vi.

riage be banished and removed from this dominion for ever, and that the justices of each respective countie within this dominion make it their particular care that this act be put in effectual execution." Other provisions are : white women having a bastard by a negro or mulatto, to pay £15 sterling, in default of payment to be sold for five years, such bastard to be bound by church wardens till thirty years of age. Servant women offending, to be likewise sold after the expiration of their term of service. " And for as much as great inconveniences may happen to this country by the setting of negroes and mulattoes free, by their either entertaining negro slaves from their master's service, or receiving stolen goods, or being grown old bringing a charge upon the country ; for prevention thereof, *Be it, &c.*, That no negro or mulatto be, after the end of this present session of assembly, set free by any person or persons whatsoever, unless such person or persons, their heirs, executors, or administrators pay for the transportation of such negro or negroes out of the country within six months after such setting them free, upon penalty of paying ten pounds sterling to the church wardens of the parish where such person shall dwell, with which money or so much thereof as shall be necessary, the said church wardens are to cause the said negro or mulatto to be transported out of the country, &c.

1692, c. 3.—*An act for the more speedy prosecution of slaves committing capital crimes.*—(" This is the *first law* constituting a tribunal expressly for the trial of slaves."—Marg. note.) Whereas a speedy prosecution of negroes and other slaves for capital offences is absolutely necessarie, that others being deterred by the condign punishment inflicted on such offenders may vigorously proceed in their labours and be affrighted to commit the like crimes and offences ; and whereas such prosecution has been hitherto obstructed by reason of the charge and delay attending the same ; *Be it, &c.*" Slave committing a capital offence to be committed to the jail of the county ; sheriff to give notice to the governor, " who is desired and impowered to issue out a commission of *oyer* and *terminer* directed to such persons of the said county as he shall think fitt, which persons forthwith after the receipt of the said commission are required and commanded



publicly at the court house of the said county to cause the offender to be arraigned and indicted, and to take for evidence the confession of the party, or the oaths of two witnesses, or of one with pregnant circumstances, without the solemnity of jury, and the offender being found guilty as aforesaid, to pass judgment as the law of England provides in the like case and on such judgment to award execution." See 1705, c. 11.

**1699, c. 12.**—*An act for laying an imposition upon servants and slaves imported into this country, &c.*—3 Hen. 193. For a history of the legislation of Virginia imposing duties on imported slaves, and titles of twenty-three several statutes from this date to 1772, see 2 Tucker's Bl., App. 49.

**1705, c. 2.**—*An act regulating elections, &c.*—3 Hen. 236, Sec. 3 enacts that "every freeholder" shall appear and vote under a penalty. 4. Excepts from the obligation and right any freeholder "being a feme-sole or feme-covert, in fact, under age, or recusant convict. 6. "Every person who hath an estate, &c., shall be accounted a freeholder."

**1705, c. 4.**—*An act declaring who shall not bear office in this country.*—3 Hen. 250. "That no person whatsoever already convicted, or which shall hereafter be convicted, &c., of treason, murther, felony, &c., &c., nor any negro, mulatto, or Indian, shall from and after the publication of this act bear any office ecclesiasticall, civill, or military, or be in any place of public trust or power, within this her majesty's colony and dominion of Virginia, and that if any person convicted as aforesaid, or negro, mulatto, or Indian shall presume to take upon him, &c.," and for clearing all manner of doubts which hereafter may happen to arise upon the construction of this act, or any other act, who shall be accounted a mulatto. *Be it, &c.*, That the child of an Indian, and the child, grandchild, or great grandchild of a negro shall be deemed, accounted, held, and taken to be a mulatto." No provision against their voting. c. 7, 3 Hen. 258, re-enacts the law of 1661-2, c. 54, respecting tithables.

— c. 11. *An act for the speedy and easy prosecution of slaves committing capitall crimes.*—3 Hen. 269. Similar to the act of 1692, c. 3, but compensates the owner upon the conviction

slave. — c. 12. “An act to prevent the clandestine exportation or carrying of persons in debt, servants and slaves, from this colony.”—3 Hen. 270.

— c. 19.—*An act for establishing the general court, &c.*, “That Popish recusants, convict negroes, mulattoes, Indian servants and others, not being Christians, shall be held and taken to be persons incapable in law to be witnesses in cases whatsoever.”

— c. 23.—*An act declaring the negro, mulatto, and Indian within this dominion to be real estate.*—3 Hen. 333, sec. 1. The words are, “to be real estate (and not chattels).” This declares slave property only under the laws of descent and judgments, executions, &c. See *Chinn v. Respass*, 1 Mun. 28.

— c. 45.—*An act for naturalization.*—3 Hen. 434, sec. 1. A foreigner may be naturalized by “the governor or commander-in-chief of this colony and dominion.” Sec. 7 “Provided that nothing in this act contained shall be construed to enable or empower or privilege to any foreigner to do or execute any act or thing, which by any of the acts made in England concerning her majesty’s plantations he is disabled to do or exe-

— c. 48.—*An act concerning marriages.*—3 Hen. 441. Prohibits servants not to marry without consent, &c. Penalties.

— c. 49.—*An act concerning servants and slaves*, 3 Hen. sec. 1.—How long servants without indenture, being Christian or of Christian parentage, shall serve. 2. The age to be admitted by the court. 3. When to produce their indentures. 4. Who shall be slaves (similar to 1682, c 1). 5. Penalty for buying and selling free persons as slaves. 6. “Provided also that a slave’s being in England, shall not be sufficient to discharge him of his slavery, without other proof of his being admitted there.” 7. Duty of masters to servants, restriction of correction. 8. Complaints of servants, how redressed. 9. Sick and disabled servants, how provided for. 10. Servants’ wages, how recovered. 11. And for a further Christian care and of all Christian servants. *Be it, &c., that no negroes, mu-*

lattos or Indians, although Christians, Jews, or Moors, Mahometans, or other infidels, shall, at any time, purchase any Christian servant nor any other, except of their own complexion, or such as are declared slaves by this act ; and if any negro, mulatto or Indian, Jew, Moor, Mahometan, or other infidel, or such as are declared slaves by this act, shall, notwithstanding, purchase any Christian white servant, the said servant shall, *ipso facto*, become free and acquit from any service then due, and shall be so held, deemed, and taken. And if any person, having such Christian servant, shall intermarry with any such negro, mulatto, or Indian, Jew, Moor, Mahometan, or other infidel, every Christian white servant of every such person so intermarrying, shall, *ipso facto*, become free and acquit from any service then due to such master or mistress so intermarrying, as aforesaid.” 12. “ Contracts of masters with their servants void, unless approved in court.” 13. Provides freedom dues at expiration of indentures of servants. 14. Penalty on servants resisting their masters. 15. Penalty for dealing with servants or slaves, without leave of their owners. 16. Punishment by stripes for so doing. 17. Servants may be whipped in lieu of fines, for a breach of penal laws. 18. Women servants having bastards, to serve longer than a year. 19. “ And for a further prevention of that abominable mixture and spurious issue, which may hereafter increase in this, her majesty’s colony and dominion, as well by English and other white men and women intermarrying with negroes or mulattos, as by their unlawful coition with them. Be it, &c. That whatsoever English or other white man or woman, being free, shall intermarry with a negro or mulatto man or woman, bond or free, shall, by judgment of the county court, be committed to prison, and there remain during the space of six months, without bail or mainprise ; and shall forfeit and pay ten pounds, &c. 20. Penalty on ministers marrying them. 21. Freedom of servants to be recorded. Penalty for entertaining them without certificate. Remainder contains various police regulations relating to slaves. Sec. 36 is as follows :—

“ And also it is hereby enacted and declared, that baptism of slaves doth not exempt them from bondage ; and that all

children shall be bond or free, according to the condition of their mothers, and the particular directions of this act."

Sec. 37, provides for the apprehension of outlying slaves, that they may be killed if resisting (as in 1680, c. 10), disorderly slaves when may be dismembered on order of court. Sec. 38. Value of slaves killed according to the act to be paid to the owner: 41 repeals all previous acts relating to servants and slaves.

— c. 52. *An act for prevention of misunderstandings between the tributary Indians and other of her majesty's subjects of this colony and dominion, and for a free and open trade with all Indians whatsoever.* (See 1691, c. 9. 1753, c. 2. II., Tucker's Bl. Ap. 47, n.) 3 Hen. 464.

1711, c. 1.—*An act for appointing Rangers.* 4 Hen. 10. That if any Indian or Indians so taken shall upon examination or tryal be found to belong to any of the nations in warr with this government, such Indian and Indians shall be transported and sold, and the benefit of said sale shall entirely belong to that party of rangers by which they were apprehended."

1723, c. 3.—*Another act relating to Indians.* Indians offending against the terms of certain treaties, "to suffer death or be transported to the West Indies, there to be sold as slaves as shall be awarded by the courts, &c." 4 Hen. 103.

1723; c. 2.—*An act for the better settling and regulation of the militia.* Sec. 6, 7 provides,—Free negroes, mulattos, or Indians may be listed and employed as drummers or trumpeters in servile labor, but are not to bear arms. c. 4. *An act directing the trial of slaves committing capital crimes, and for the more effectual punishing conspiracies and insurrections of them, and for the better government of negroes, mulattos and Indians, bond or free.* Sec. 1 relates to the punishment of plots, &c. It provides for proceedings against slaves committing capital crimes, similar to 1705, c. 11, and 1692, c. 3, with the exception of the allowance in such cases of "the testimony of negroes, mulattos or Indians, bond or free, with frequent circumstances as shall to them (the justices) seem convincing," &c. 17. "That no Negro, mulatto, or Indian slaves shall be set free upon any pretence whatsoever, except for some meritorious

services, to be adjudged and allowed by the governor and council, &c." 18. Dismembering of slaves (explains 1705, c. 49, s. 37,) provided for. 19. Death of slave under dismemberment, not punishable, if not intended; "neither shall any person whatsoever who shall be indicted for the murder of any slave, and upon trial shall be found guilty only of manslaughter, incur any forfeiture or punishment for such offence or misfortune." (Repealed 1788, c. 23, see 2 Tucker's Bl. App. 56.) 21. All free negroes, &c. (except tributary Indians), above sixteen years of age, and their wives declared tithable. 22. Children of mulatto or Indian women, bound to serve for years, how long to serve. 23. "That no free negro, mulatto or Indian, whatsoever, shall hereafter have any vote at the election of burgesses, or any other election whatsoever." (See 1785, c. 55; 1794, c. 17.) 4 Hen. 119, 126.<sup>1</sup>

1726, c. 4.—*An act for amending an act concerning servants and slaves, and for the further preventing the clandestine transportation of persons out of this colony*, mostly regards the exportation of runaway slaves, whose owners cannot be discovered. 4 Hen. 168.

1727, c. 11.—*An act to explain and amend the act for declaring slaves to be real estate.* § 3. "Slaves to pass as chattels" (margin) may be conveyed as such by will, by deed of gift or of sale.

1732, c. 7. *An act for settling some doubts, &c.*, sec. 5. "And whereas negroes, mulattos, and Indians, have lately been frequently allowed to give testimony as lawful witnesses in the general court and other courts of this colony, when they have professed themselves to be Christians, and been able to give some account of the principles of the Christian religion; but forasmuch as they are people of such base and corrupt natures that the credit of their testimony cannot be certainly depended upon, and some juries have altogether rejected their evidence and others have given full credit thereto"—enacts that negroes, mulattos, and Indians, whether slaves or free, shall be disabled to be witnesses, except on the trial of a slave for a capital offence, and refer

<sup>1</sup> See 2 Chalmers' Opinions, p. 113. Opinion of West against the propriety of sanctioning this section of this act, on the ground that no distinction should be made between free persons, in respect to color.

to 1723, c. 4, how such testimony shall be taken.—4 Hen. 325.

1734, c. 8. *An act for allowing Indians to be witnesses in criminal offences committed by Indians.*—4 Hen. 405.

1744, c. 13. *An act to amend, &c.*, sec. 2, provides that “any free negro, mulatto, or Indian, being a Christian, shall be admitted in any court of this colony, or before any justice of the peace, to be sworn as a witness, and give evidence for or against any other negro, mulatto, or Indian, whether slave or free, in all causes whatsoever, as well civil as criminal, any law, custom or usage to the contrary in any wise notwithstanding.”—5 Hen. 244.

1748, c. 2. *An act declaring slaves to be personal estate, and for other purposes therein mentioned.* This act, with others of this session, having been repealed by the king, representation was made against the repeal, assigning reasons, see 5 Hen. 432–443.<sup>1</sup>

1748, c. 14, a revision of laws under an act of 1745, see 1 Hen. pref. vi. An act concerning servants and slaves. Re-enacts most of previous laws on this subject. Sec. 1. How long servants imported without indentures shall serve. 2. What persons imported shall be slaves,—same rule as in 1705, c. 49, s. 4., and in 1682, c. 1, s. 3. A penalty for importing and selling a free person as a slave. 4. “That a slave’s being in England shall not be a discharge from slavery, without proof of being manumitted there; and that baptism of slaves doth not exempt them from bondage; and that all children shall be bond or free according to the condition of their mothers, and the particular directions of this act.” 5. Masters’ duty to servants,—“that they shall not give immoderate correction, nor whip a Christian white servant naked without an order from a justice of the peace,” &c. 6. Justices to receive servants’ complaints, proceeding thereon. 7. No contracts between masters and servants unless in court—servants shall have the property of their own effects—sick or lame servants may not be discharged. 8. Servants shall have their freedom dues. 9. Same as 1705, c. 49, s. 11. 10. Penalty for dealing with servants or slaves.

<sup>1</sup> This statute did not change the law. Slaves were real estate, in 1777. See *Chinn v. Respass*, 1 Munroe’s R., 27.

11. Duty of servants ; their punishment in case of resistance. 12. Punishment by whipping in lieu of fine. 13. Servants when free to have a certificate. 14–22. Respecting runaway servants. Sec. 19, provides that runaways belonging to inhabitants of Maryland and Carolina may be detained until claimed by their owners. 23, 24. Respecting servants contracting to serve by the year, and apprentices. 25. Stealing made a felony without clergy.

— c. 22. *An act to prevent the clandestine transportation or carrying of persons in debt, servants or slaves, out of this colony.*

— c. 38. *An act directing the trial of slaves committing capital crimes, and for the more effectual punishing conspiracies and insurrections of them, and for the better government of negroes, mulattoes, and Indians, bond or free.* § 1–10. Punishment for certain crimes, like 1723, c. 4. 11. Excludes the testimony of negroes, &c., slave or free, except on trial of slaves for capital offences. 12. Admits testimony of free negro, &c., being a Christian, against or between other negroes, &c. 13–16. Of unlawful meetings of slaves. 17. Punishment of slaves for being found abroad without leave. 18, 19. Arms and ammunition not allowed to negroes, &c., except those on the frontier, having a license. 20. Negro lifting his hand against a white person shall receive thirty lashes. 21. Against outlying slaves. 22. Their value, if killed in the attempt to seize them as such, to be paid by the public. 23, 24, 25. Respecting homicide of slaves, dismembering of disorderly slaves, as in 1723, c. 4, s. 18, 19. 26. Slaves freed without legal license may be sold by the churchwardens.—5 Hen. 432, 547 ; 6 Hen. 40, 104.

1753, c. 7. *An act for the better government of servants and slaves.* Most of the acts of 1748, having been repealed by the king, 1752, this is substantially a re-enactment of 1748, c. 14, which had been so repealed—see 6 Hen. 215.

1757, c. 3. Respecting the militia, as to enlisted free negroes, the same as in 1723, c. 2.—17 Hen. 93.

1765, c. 24. *An act to prevent the practice of selling persons as slaves that are not so, &c.*—8 Hen. 133.



— c. 25. *An act to amend the act for the better government of servants and slaves* (1753, c. 7): in respect to runaways.

— c. 26. An act to amend the act (1748, c. 38) which for the trial of slaves required the issue of a special commission:— Sec. 1, provides for issuing commissions of oyer and terminer, directed to the justices of each county respectively, empowering them from time to time to try, condemn and execute, or otherwise punish or acquit, all slaves committing capital crimes within their county; and when any commission for constituting justices of the peace shall hereafter issue, a general commission of oyer and terminer for the purposes aforesaid shall be sent therewith, &c. 2. Court how convened, &c., “without the solemnity of a jury,” &c. Another sec. allows benefit of clergy where a slave is convicted of manslaughter for killing a slave.—8 Hen. 133, 135, 137.

1769, c. 19. *An act to amend the act, &c.*, (the same act of 1748, c. 38.) Sec. 1, reciting that by the act “the county courts within this dominion are impowered to punish outlying slaves who cannot be reclaimed, which punishment is often disproportioned to the offence and contrary to the principles of humanity. *Be it, &c.*, that it shall not be lawful for any county court to order and direct castration of any slave, except such slave shall be convicted of an attempt to ravish a white woman, in which case they may inflict such punishment.”

The remaining sections relate to runaway slaves.

— c. 37. *An act for exempting free negro, mulatto, and Indian women from the payment of levies*—referring to previous statutes declaring such persons tithable, and chargeable with public, &c., levies, “which is found very burdensome to such negroes, mulattoes, and Indians, and is moreover derogatory to the rights of freeborn subjects”—enacts that “all free negro, mulatto and Indian women, and all wives, other than slaves, of free negroes, mulattoes and Indians,” shall be exempted.—8 Hen. 358, 393.

1772,<sup>1</sup> c. 9. *An act for amending the acts concerning the*

<sup>1</sup> As an expression of the sense of the people of Virginia, at this time, on the subject of slavery: see Petition of the House of Burgesses, April 1, 1772, addressed to

*trials and outlawries of slaves.* Sec. 1. Slaves convicted of house-breaking in the night, are not excluded from clergy unless a free-man in the like case would be so. 2. Sentence of death not to be passed upon a slave, unless four of the court, being a majority, concur. 3. That no justice or justices of the peace of this Colony shall, by virtue of the said act, issue a proclamation against any slave authorizing any person to kill or destroy such slave, unless it shall appear to the satisfaction of such justice or justices that such slave is outlying and doing mischief; and if any slave shall hereafter be killed or destroyed by virtue of any proclamation, issued contrary to this act, the owner or proprietor of such slave shall not be paid for such slave by the public; any thing in the said recited act (1748, c. 38. § 21, 22.) to the contrary, &c.

1775. Ordinance of convention, c. 4, sec. 2, that the voters for representatives shall be "the freeholders properly qualified by law to vote for burgesses;" c. 7, one clause provides for the transportation to the West India islands of any slave, "taken in arms against this colony, or in the possession of an enemy, through their own choice," by the Committee of Safety:—the owners to be paid. 9 Hen. 106.

1776, June 12. By the Convention of Delegates, the ordinance 9 Hen. 109, unanimously adopted, known as the Virginia Declaration of Rights (1 Hen. 47), of which the first article reads, "That all men are by nature equally free and independent, and have certain inherent rights of which when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely the enjoyment of life and liberty, with the means of acquiring and possessing property, and the pursuing and obtaining happiness and safety." The fourth

the King, "to remove all those restraints on your Majesty's governors of this colony which may inhibit their assenting to such laws as may check so very pernicious a commerce," meaning the importation of slaves, 2 Tucker's Blackstone, App. 51.

<sup>1</sup> See conflict of judicial opinion as to the personal extent of this article in *Higgins v. Wrights*, 1 Hen. & Munford's R. pp. 184, 143. Wherein the Chancellor, George Wythe (one of the signers of the Continental Declaration of Independence), "on the ground that freedom is the birth-right of every human being, which sentiment is strongly inculcated in the first article of our 'political catechism,' the bill of rights—he laid it down as a general position, that whenever one person claims to hold another in slavery, the *onus probandi* lies on the claimant." The Court of Appeals

article—"That no man or set of men are entitled to exclusive or separate emoluments or privileges from the community, &c." The sixth—"That all men, having sufficient evidence of permanent common interest with and attachment to the community, have the right of suffrage," &c.

1776, June 26. In the preamble to the Constitution or form of government, 9 Hen. 112, adopted by the Delegates, is recited that the King had perverted the kingly office into a "detestable and insupportable tyranny, by —" &c., among which—"prompting our negroes to rise in arms among us—those very negroes whom, by an inhuman use of his negative, he hath refused us permission to exclude by law." No formal bill of rights is incorporated with this constitution. The seventh article provides that "the right of suffrage in the election of members for both Houses, shall remain as exercised at present."

### § 219. LEGISLATION OF MARYLAND.

The territory constituting the present State of Maryland had, before the grant to Lord Baltimore, June 20, 1632,<sup>1</sup> been included within the limits of the Virginia colony. Whatever laws had territorial extent in Virginia before that date, may be taken to have been law in Maryland.

1637. In the assembly of this year, the first of the colony, the freemen agreed to a number of bills which were never enacted

held :— "This Court, not approving of the Chancellor's principles and reasoning in his decree made in this cause, except so far as the same relates to white persons and native *American Indians*, but entirely disapproving thereof so far as the same relates to native *Africans* and their descendants, who have been and are now held as slaves by the citizens of this State, and discovering no other error," &c.

<sup>1</sup> The charter, s. 7, granted legislative powers to the Lord Proprietor, "with the advice, assent and approbation of the freemen of the same province or the greater part of them, or of their delegates or deputies," \* \* "so, nevertheless, that the laws aforesaid be consonant to reason, and be not repugnant or contrary, but (so far as conveniently may be) agreeable to the laws, statutes, customs and rights of this our kingdom of England." Sec. 8, mentions "the Freeholders of the said Province, their delegates, &c." Sec. 10, provides, "that all and singular the subjects and liegemen of us, our heirs and successors, transplanted or hereafter to be transplanted into the province aforesaid, and the children of them and of others their descendants, whether already born there or hereafter to be born, be and shall be natives and liegemen of us, &c., &c." \* \* and likewise all privileges, franchises, and liberties of this our kingdom of England, freely, &c., have and possess," &c., &c. Bacon's laws of Maryland.

into laws. A list only of these has been preserved, of which one is *A bill for punishment of ill servants, another for limiting the times of service*. See Bacon's laws, from which the following citations of laws are taken,

**1638, c. 2.** *An act ordaining certain laws for the government of this province* (limited to three years). The fourth section provides, "The inhabitants shall have all their rights and liberties according to the great charter of England."

In a list of bills twice read, and engrossed but never passed, is *An act for the liberties of the people*. "They are thus enumerated in the Bill, viz., all Christian inhabitants (slaves excepted) to have and enjoy all such rights, liberties, immunities, privileges and free customs, within this province, as any natural born subject of England hath or ought to have or enjoy in the realm of England, by force or virtue of the common law or statute law of England, saving in such cases as the same are or may be altered or changed by the laws and ordinances of this province, &c."

**1641, c. 6.** *An act against Fugitives*.—"This act (which made it felony of death, together with forfeiture of lands, goods, &c., for any apprentice servant to depart away secretly from his or her master or dame, with intent to convey him or herself away out of the province; and in any other person that should willingly accompany such servant in such unlawful departure, unless his Lordship or his Lieutenant-General should think proper to change such pains of death into a servitude not exceeding seven years, &c.), was superseded by the act of 1649, c. 5, which last was repealed by 1676, c. 7.

There are various acts and titles of acts, given in Bacon's laws, relating to servants, fugitives, runaways, and those that entertain them, servants that have bastards, &c. It is remarkable that these laws, and the early statutes respecting negro slaves, were enacted for short periods, usually three years, and were continued from time to time by re-enactments. Their provisions are so similar to those of Virginia, on the same subject, that it is not necessary to make a particular statement of them. The same collection contains numerous acts naturalizing,

on petition, persons of French, Dutch and Swedish surnames. The first statute relating to negro slaves, which in this collection is given in full, is that of 1715, c. 44. Others before that date are described by their titles only. The earliest law on the subject appears to have been that of

**1663, c. 30.** *An act concerning negroes and other slaves*, confirmed by 1676, c. 2. This is not given in Bacon's laws; as cited, *Butler v. Boarman*, 1 Harris & McHenry, 37,<sup>1</sup> it enacts, s. 1. "All negroes or other slaves within the province, and all negroes and other slaves to be hereafter imported into the province, shall serve *durante vita*; and all children born of any negro or other slave, shall be slaves as their fathers were for the term of their lives." Sec. 2. "And forasmuch as divers free-born *English* women, forgetful of their free condition, and to the disgrace of our nation, do intermarry with negro slaves, by which also divers suits may arise, touching the issue of such women, and a great damage doth befall the master of such negroes, for preservation whereof for deterring such free-born women from such shameful matches, *be it enacted, &c.*: That whatsoever free-born woman shall intermarry with any slave, from and after the last day of the present assembly, shall serve the master of such slave during the life of her husband; and that all the issue of such free-born women, so married, shall be slaves as their fathers were." Sec. 3. "And be it further enacted, that all the issues of *English*, or other free-born women, that have already married negroes, shall serve the master of their parents, till they be thirty years of age and no longer."

**1666, c. 22.** *An act against runaways and such as shall entertain them*, extended, 1671, c. 19; rep. 1676, c. 2.

**1669, c. 18.** *An act for preventing servants and criminal persons running out of this province.*

**1671, c. 2** *An act encouraging the importation of negroes and slaves into this province, confirmed, 1676, c. 2: a new act 1692, c. 52.*

**1676, c. 7.** *An act relating to servants and slaves;—for*

<sup>1</sup> On a claim for freedom by the descendants of Eleanor Butler in 1770, see also 2 Harris & McHenry, 214. 1 Hildr. 568. Stroud's *Sketch*, &c., p. 15.

three years, but re-enacted (a new act 1692, c. 15). c. 16, *An act against the importation of convicted persons into this Province* ; continued by re-enactments ; a new law 1692, c. 74.

1681, c. 4. *An act concerning servants and slaves*. This act is cited in *Butler v. Boarman*, 1 Harris & McHenry, 372. The first section is to the same effect as the first of 1663, c. 30. Sec. 2, recites—"Forasmuch as, divers free-born *English*, or white women, sometimes by the instigation, procurement or connivance, of their masters, mistresses, or dames, and always to the satisfaction of their lascivious and lustful desires, and to the disgrace not only of the *English*, but also of many other Christian nations, do intermarry with negroes and slaves, by which means, divers inconveniences, controversies, and suits may arise, touching the issue or children of such free-born women aforesaid ; for the prevention whereof for the future, be it, &c., enacts that if the marriage of any woman-servant with any slave shall take place by the procurement or permission of the master, such woman and her issue shall be free, and enacts a penalty by fine on the master or mistress and on the person joining the parties in marriage.

1692. c. 15. *An act relating to servants and slaves*. A new act, 1699, c. 43 ; c. 52, *An act for the encouragement of the importation of negroes and slaves into this Province*. c. 79, *An act concerning negroes and slaves*, continued by re-enactments.<sup>1</sup>

1695, c. 6. *An act restraining the frequent assembling of negroes within this province* ;—temporary but continued by re-enactments.

1696, c. 7. *An act laying an imposition on negroes, slaves and white persons imported* ; afterwards included in

1699, c. 23. *An act for raising a supply, &c., and to prevent too great a number of Irish papists being imported into this Province*.

<sup>1</sup> The titles only are given in Bacon's laws. In "Plantation laws" (London 1705), Maryland, p. 50, a law of this year is cited. "Where any negro or slave, being in servitude or bondage, is or shall become Christian, and receive the sacrament of baptism, the same shall not nor ought to be deemed, adjudged or construed to be a manumission or freeing of any such negro or slave, or his or her issue, from their servitude or bondage, but that notwithstanding they shall at all times hereafter be and remain in servitude and bondage as they were before baptism, any opinion, matter or thing to the contrary notwithstanding."

**1699, c. 43.** *An act relating to servants and slaves*—a new act made 1704, c. 23, which was replaced by the revision 1715, c. 47.

**1700, c. 8.** *An act for repealing certain laws, &c.* All the acts before mentioned, passed before 1699, except that of 1692, c. 52, for encouragement of the importation of slaves, are repealed.<sup>1</sup>

**1704, c. 33.** *An act imposing three pence per gallon on rum and wine, brandy and spirits, and twenty shillings per poll for negroes, for raising a supply to defray the public charge of this province, and twenty shillings, per poll, on Irish servants, to prevent the importing too great a number of Irish papists into this province,* enacted for three years, but afterwards revived and continued by various acts, the last being that of 1783, c. 20, enacted for twenty-one years.

— **c. 93.** *An act for the advancement of the natives and residents of this province ;* enacts that no persons shall hold office, with the exception of those commissioned by the crown, until after three years' residence.

**1705, c. 6.** *An act for punishment of persons selling or transporting any friend Indian or Indians, out of this Province*—continued in the revision of 1715.

**1715, c. 15, sec. 5.** “And for the better ascertaining what persons are and shall be deemed taxables<sup>2</sup> and what not, *be it enacted*, that all male persons, residents in this province, and all

<sup>1</sup> In “Plantation laws,” Maryland, p. 68, an act is given of this date: it contains provisions respecting servants, similar to those in Virginia and other colonies. Sec. 19, provides,—“All negroes and other slaves imported into this province, and their children, shall be slaves during their natural lives.” Sec. 20. “Any white woman, free or servant, that suffers herself to be begot with child, by a negro, or other slave, or free negro; such woman, if free, shall become a servant for seven years; if a servant, shall serve seven years longer than her first term of service. If the negro that begot the child be free, he shall serve seven years to be adjudged by the justices of the county court, and the issue of such copulations shall be servants till they arrive at the age of thirty-one years. And any white man that shall get a negro woman with child (whether free or servant) shall undergo the same penalties as white women.”

<sup>2</sup> Mr. Stroud, in *Sketch, &c.*, 2d ed., p. 16, observes that the rule attributing slavery to the issue of slave fathers being repealed by this act, there was no written law to determine the condition of the issue of slaves until 1715, c. 44. Whether the law of 1704, c. 23, contained any rule does not appear in Bacon's laws.

<sup>3</sup> That is, for the poll tax, abolished by the State bill of rights. 1 Dorsey's laws, p. 8. Compare the note on the Virginia law of 1649, c. 2, relating to *titables*.



female slaves therein of the age of sixteen years or above, shall be accounted taxables"—with some exceptions.

**1715, c. 19.** *An act prohibiting all masters of ships or vessels, or any other person, from transporting or conveying away any person or persons out of this Province without passes.* By sec. 3, every person who shall convey away "any servant or servants, being servants here by condition for wages, indenture, or custom of the country, shall be liable, &c. Sec. 5. Persons who shall entice, transport, &c., any apprentice or other servants or slaves belonging to any inhabitant, &c. (1 Dorsey's laws, p. 9; note, see 1753, c. 9; 1748, c. 19; 1793, c. 45; 1780, c. 24; 1824, c. 85; 1818, c. 157.)

— c. 44. *An act relating to servants and slaves, contains 135 sections, similar in effect to contemporary Virginia laws.* Sec. 6, relates to runaways, and the apprehension of any person or persons whatsoever travelling out of the county wherein they reside with a pass, or persons "not sufficiently known or able to give a good account of themselves." 23. Provides that all negroes and other slaves, already imported or hereafter to be imported into this province, and all children now born or hereafter to be born of such negroes and slaves, shall be slaves during their natural lives. 24. Declaratory that baptism of slaves does not thereby manumit or set free such slaves. 26. White women got with child by slaves or free negroes shall become servants for seven years. 27. The free negro father to serve a like period, and the children until thirty-one years of age. 28. Any white man that shall beget any negro woman with child, whether free woman or servant, shall undergo the same penalties as white women. See the abstract in 2 Hildr. 323, and the provisions as to runaways, &c., in Stroud's Sketch, 2d ed., 131.

**1717, c. 13.** An act supplementary to the above. Sec. 2, enacts that "no negro or mulatto slave, free negro, or mulatto born of a white woman, during his time of servitude by law, or any Indian slave or free Indian, natives of this or the neighboring provinces, be admitted or received as good and valid evidence in law, in any matter or thing whatsoever, depending

before any court of record, or before any magistrate within this province wherein any Christian white person is concerned. 3. Admits their evidence against one another, provided not extending to depriving of life or member. 4. Provides for paying the owner when the slave has been capitally convicted. 5. Negroes or mulattoes of either sex, intermarrying with whites, are to be slaves for life ; except mulattoes born of white women, who shall serve for seven years ; and the white party for the same time. Supplementary are acts—1719, c. 2 ; 1728, c. 4 ; 1748, c. 19 ; 1765, c. 28.

**1723**, c. 15. *An act to prevent the tumultuous meeting and other irregularities of negroes and other slaves.* Sec. 4. That “ negro or other slaves striking white persons—their ears may be cropt on order of a Justice.” 6. Forbids slaves possessing cattle. 7. Negroes outlying and resisting may be “ shot, killed or destroyed.” Supplementary act, 1751, c. 14. Value of slave killed to be paid to the owner. Supplementary are 1737, c. 7 ; 1753, c. 26.

**1728**, c. 4. Supplementary to 1715, c. 44. Free mulatto women, having bastard children by negroes and other slaves, and free negro women, having bastard children by white men, and their issue, are subjected to the same penalties which, in the former act, sec. 26, are provided against white women.

**1729**, c. 4. Reciting that many petit treasons and cruel murders have been committed by negroes, and “ that the manner of executing offenders prescribed by the laws of England is not sufficient to deter a people from committing the greatest cruelties who only consider the rigour and severity of punishment,” provides that any negro or other slave, on conviction of certain crimes, shall be hanged, and the body quartered and exposed.

**1731**, c. 7. Supplementary to above act and to 1723, c. 15. Continued 1740, c. 7 ; 1744, c. 18 ; 1747, c. 16—incorporated in new law, 1751, c. 14.

**1750**, c. 5. *To remedy some evils relating to servants*, temporary, but continued by 1766, c. 5 ; 1773, c. 12 ; 1781, c. 29.

**1751**, c. 14. A revisal of the acts relating to punishment of crimes committed by slaves. Sec. 2, 4, providing for punish-

ment of death without benefit of clergy. A trial by jury and justices of assize, as in case of other persons, appears to be contemplated.—For three years. Supplementary, is 1753, c. 26 ; continued by 1754, c. 19 ; 1765, c. 17.

**1752, c. 1.** *An act to prevent disabled and superannuated slaves being set free, or the manumission of slaves by any last will or testament.* Temporary—continued 1766, c. 1 (for 20 years).

**1763, c. 28.<sup>1</sup>** *An act imposing additional duties on slaves,* continued 1766, c. 13 ; 1773, c. 14 (7 years).

**1776, July 3.** The provincial convention at Annapolis, resolving on the election of a new convention, to “be elected for the express purpose of forming a new government by the authority of the people only.” “All free men above twenty-one years, being freeholders of not less,” &c., or having property of value designated, were to be admitted to vote. *Maryl. laws for Annapolis, 1787.*

## § 220. LEGISLATION OF MASSACHUSETTS.

The colonists who landed at Plymouth, in 1620, exercised, until the year 1692, a separate legislative power over a portion of the present State of Massachusetts. Their enactments have been published separately from those of the colony of Massachusetts Bay, under the name of the *Plymouth Colony Laws*, edited by W. Brigham, Boston, 1836. In these, pp. 36, 50, the origin of their legislative power is ascribed to their compact, signed 11 Nov. 1620. These laws do not contain any declaration in the nature of a bill of rights beyond that first printed in 1661, and first declared in 1636, under the name of the *General Fundamentals*.<sup>2</sup> *Plym. Col. Laws*, advertis. p. viii. and Part III.;

<sup>1</sup> This is the last year of Bacon's laws.

<sup>2</sup> This was, for the greater part, a declaration of political power. It will be remembered that the Plymouth colonists had no *charter* from the king. The patent for *Virginia*, of 1606, applied to the entire region of America claimed by the English. See its guarantees, *ante*, p. 228, note. “The great patent of New England,” of 1620, established a council in “Plymouth, in the county of Devon,” in England, and empowered them to “ordain and establish all manner of orders, laws, directions, instructions, forms and ceremonies of government and magistracy, fit and necessary for and concerning the government of the said colony and plantation [New England], so always

the first and fourth articles of which have this character and have already been cited.<sup>1</sup> They contain some provisions respecting indentured servants, pp. 34, 35, 47, 58, 61, 65, 81, 140, 195. From these, however, it would appear that the condition of such servants, if of English origin, was in this colony less burdensome than that of persons of the same class in other settlements, and that the policy of the colony was to encourage their emancipation and facilitate their settlement on land of their own.

It would seem that such persons even participated in the exercise of the elective franchise during the first sixteen years of the settlement.<sup>2</sup> But it appears that in 1636, not even all male *freeholders* were entitled to vote, and the laws distinguish "freemen" or "associates" as a distinct portion of the inhabitants, constituting a corporation, Ply. Col. L. pp. 42, 62, 100, 108, 113.<sup>3</sup> In 1657, it was enacted "that all such as reside within this government "that are att their owne despose,"

as the same be not contrary to the laws and statutes of this our realm of Engand," &c. The "principal governors" were empowered to govern by the laws so established, "so always as the statutes, ordinances, and proceedings, as near as conveniently may, be agreeable to the laws, statutes, government, and police of this our realm of England." It was also provided "that the persons, being our subjects, which shall go and inhabit," &c., should have the privileges of subjects born in England (in words almost literally the same as those used in the second charter of Virginia, *ante*, p. 229). See Patent in 1 Hazard, 103, and summaries; 1 Ban. 272; 1 Hild. 152. The council for New England, under this, granted a patent to Governor Bradford and "his associates," the Plymouth colonists, 1630, with powers of government according to the terms of the Great Patent, 1 Haz. 298; Plym. Col. Laws, 21. A patent issued for their benefit to John Pierce, in 1621. See Young's Chronicles, p. 114, n.; Plym. Col. Laws, p. 50. This patent seems not to have been used. As to powers derived from patents, see *ante*, § 127.

<sup>1</sup> *Ante*, § 129.

<sup>2</sup> Some of the signers of the original compact are designated as persons "in the family" of some one of the others. See Prince, Part II. p. 86, 105. 1 Banc. 322. "For more than eighteen years 'the whole body of the male inhabitants' constituted the legislature." If the same anomaly existed in the colony of Massachusetts Bay, the exception herein before taken (p. 121, n. 4,) to Mr. Bancroft's statement is ill-founded. At the period when slavery or bondage existed under the Saxon law, and the term *freemen* designated a class having, by the elective franchise, a share of political power, still, all who were not bondsmen were not freemen, in that sense. N. Bacon's Hist. Disc. p. 56, describing the *Free-lazzi*, "yet attained they not to the full pitch of freemen; for the lord might acquit his own title of bondage, but no man could be made free without the act of the whole body." Comp. *ante*, p. 125, n. 2, p. 136, n. 8.

<sup>3</sup> Thus assuming to have that legal foundation for their civil polity, which the "freemen of the company" of the colony of Massachusetts Bay claimed for themselves under their charter from the king.

who would not take the oath of fidelity should depart the government or pay a fine, *Plym. Col. L.* p. 102.<sup>1</sup>

No mention is made of *negroes* or of *slaves*. But from certain regulations, in 1676, it appears that there were some Indian captives held as slaves, and liable to be sold as such. *Plym. Col. L.* pp. 177, 178, and on p. 187. "This courte sees cause to prohibit all and every person or persons within our Jurisdiction or elsewhere, to buy any of the Indian children of any of those our captive salvages that were taken and became our lawfull prisoners in our late warres with the Indians, without special leave, liking, and approbation of the government of this jurisdiction."

Special regulations for Indians, enacted 1682, are found, p. 196.

It is difficult to fix the precise date of many of the enactments proceeding from the Colony of Massachusetts Bay.<sup>2</sup> This, however, is not very material for the present purpose. The exercise of local legislative power dates from October 19, 1630, when the general court of the "freemen" or members of the corporate body created by the royal charter of March, 1629,<sup>3</sup> was first held at Boston.

1631, May. "To the end that the body of freemen may be preserved of honest and good men: It is ordered that henceforth no man shall be admitted to the freedom of this commonwealth, but such as are members of some of the churches within the limits of this jurisdiction." *Charters, &c.*, p. 117 (see *post*, laws 1660, 1665).

<sup>1</sup> Analogous to this were the laws against Quakers, who would acknowledge no civil authority.

<sup>2</sup> See the *Advertisement* by the compilers of the *Charters and General Laws of the Colony and Province of Massachusetts Bay*. Boston, 1814. 8vo.

<sup>3</sup> By the name, "the Governor and Company of Massachusetts Bay, in New England," the corporators had a patent from the council of Plymouth, in England, dated March 19, 1628. The governor, deputy, and assistants provided for the government by the charter were to be chosen out of the "freemen" or stockholders first named therein, and those admitted by them in general courts, at which laws might be enacted for the government of the colony "so as such laws and ordinances be not contrary or repugnant to the laws and statutes of this our realm of England." In terms almost identical with the 15th art. of the Virginia patent, of 1606, (*ante*, p. 228,) it was provided that all subjects who should "go to and inhabit within the said lands," &c., and their children should have "the liberties and immunities of free and natural subjects," &c. 1 Hazard's Coll. 239. *Charters, &c.*, p. 3, 13.

**1682, March.** As an addition to an order made 22 March, 1630, it is ordered "that if any single person be not provided of sufficient arms allowable by the captains, &c., he shall be compelled to serve by the year, with any master that will retain him for such wages as the court shall think meet to appoint." *Charters, &c., App. p. 712.*

**1633-7.**—It is declared, &c., "that what lands any of the Indians in this jurisdiction have possessed and improved, by subduing the same, they have just right unto, according to that in Gen. 1, 28 and ch. 9, and Psal. 115, 16. And for the further encouragement of the hopeful work amongst them for the civilizing and helping them forward to Christianity; if any of the Indians shall be brought to civility and shall come among the English to inhabit, in any of their plantations, and shall there live civilly and orderly; that such Indians shall have allotments amongst the English according to the custom of the English in like case.

"Further it is ordered, that, if upon good experience, there shall be a competent number of the Indians brought to civility so as to be capable of a township, upon their request to the General Court, they shall have grant of lands undisposed of for a plantation as the English have." See the General Laws and Liberties of Massachusetts Colony, revised, &c., ed. Cambridge, 1675. Title—*For settling the Indians' title to lands in this jurisdiction.*

In the same law there is a provision, common in all the colonies, forbidding the sale of fire-arms and ammunition to any Indian.

**1630-1641.**—"It is also ordered that when any servants shall run from their masters, or any other inhabitants shall privily go away with suspicion of evil intentions, it shall be lawful for the next magistrate or the constable and the two chief inhabitants, where no magistrate is, to press men and boats or finances, at the public charge, to pursue such persons by sea or land, and bring them back by force of arms." *Charters, &c., ch. 68.* Title,—*Acts respecting masters and laborers,* § 3.

**1636.**—It is ordered that no servant shall be set free, or

have any lot, until he have served out the time covenanted ; under penalty of such fine as the quarter courts shall inflict, &c. Charters, &c., p. 42. Title—*Acts respecting freemen and servants.*<sup>1</sup>

**1641.**—This is the date of the celebrated “Massachusetts Fundamentals” or “Body of Liberties,”<sup>2</sup> the preamble of which is as follows :

“Forasmuch as the free fruition of such liberties, immunities and privileges as humanity, civility, and christianity call for as due to every man, in his place and proportion, without impeachment and infringement, hath been and ever will be the tranquillity and stability of churches and commonwealths, and the denial or deprival thereof, the disturbance, if not the ruin of both, we hold it therefore our duty and safety, whilst we are about the further establishing of this government, to collect and express all such freedoms as for the present we foresee may concern us and our posterity after us, and to ratify them with our solemn consent. We do therefore this day religiously and unanimously decree and confirm these following rights, liberties and privileges concerning our churches and civil state to be respectively, impartially and inviolably enjoyed and observed throughout our jurisdiction forever.” (Cambr. ed. laws, 1675, p. 1.)

The ninety-eight articles of this code are classed under distinct headings or titles, commencing with a general statement of the rights of the inhabitants in seventeen articles ; the first of which is as follows : “No man’s life shall be taken away, no man’s honor or good name shall be stained, no man’s

<sup>1</sup> By the Mass. Records, vol. I., pp. 246, 269, it appears the General Court sentenced certain offenders, in 1638, 1639 “to be delivered up a slave” to persons appointed by the court.

It is believed that there is no mention made of negro slaves previous to the act of 1696 or 1698 hereinafter cited. But it appears from “Josselyn’s Voyage,” see Mass. Hist. Col., 3d series, vol. III., p. 231, that there were, in 1639, some negroes in the colony held in slavery ; and see Dr. Belknap’s letter to Dr. Tucker, in Mass. Hist. Col. 1st series, vol. IV., p. 194.

<sup>2</sup> For the history of this act and an abstract of its provisions, see 1 Hildr. p. 274. 1 Savage’s Winthrop, p. 160. Mass. Hist. Col. 3d series, vol. VIII., p. 191 ; a paper by F. C. Gray, L.L. D., containing the history of the previous publications, and a more authentic copy. Commonw. v. Alger, 7 Cushing, 67.



person shall be arrested, restrained, banished, dismembered, nor any ways punished, no man shall be deprived of his wife or children, no man's goods or estate shall be taken away from him, nor any way indamaged under color of law or countenance of authority, unless it be by virtue or equity of some express law of the country warranting the same, established by a General Court and sufficiently published ; or, in case of the defect of a law in any particular case, by the word of God, and in capital cases or in cases concerning dismembering or banishment, according to that word, to be judged by the General Court."

Article 2. "Every person within this jurisdiction, whether inhabitant or foreigner, shall enjoy the same justice and law that is general for the plantation, which we constitute and execute towards one another without partiality or delay."

Article 17. "Every man of or within this jurisdiction, shall have free liberty, notwithstanding any civil power, to remove both himself and his family at their pleasure out of the same, provided there be no legal impediments to the contrary."

The next forty-one articles are called 'rights, rules, and liberties concerning judicial proceedings.' There is no mention made among these of involuntary servitude as a punishment. Though 'barbarous and unusual punishments' are prohibited, it seems not to have been taken as applying to whipping, the pillory, cropping and other similar inflictions.<sup>1</sup>

Twenty articles contain 'liberties more particularly concerning the freemen,' which relate to the civil polity of the colony. In one of these articles it is enacted that 'no prescription or custom may prevail to establish any thing morally sinful by the word of God.' (Laws, Cam. 1675, p. 126.) 'Liberties of women' is the subject of two articles ; 'liberties of children'

<sup>1</sup> In 1681, a negro who had been convicted of arson, was publicly burned alive in Boston ; this was the old common law punishment. 4 Blacks. Comm., 222. In 1755 a man and a woman, negro servants of Captain John Codman, of Charlestown, were executed under sentence of the Assizes, for poisoning their master ; the woman was burned. Oliver's Pur. Commonwealth, p. 84. 2 Elliot's Hist. New E., 187. The crime was petit treason by common law, and to be drawn and burnt, instead of being drawn and hanged, was "the usual punishment for all sorts of treasons committed by those of the female sex," until 80 Geo. III., c. 48. 4 Bl. Comm., 204. It would seem from these instances that, after all, the courts were obliged to resort to 'common law' to find out what punishments were not "barbarous and unusual."

of four articles. It is enacted in four articles, entitled, 'liberties of servants.'

Article 85. "If any servants shall flee from the tyranny and cruelty of their masters to the house of any freeman of the same town, they shall be there protected and sustained, until due order be taken for their relief; provided due notice thereof be speedily given to their masters from whom they fled, and the next assistant or constable where the party plying is harbored."

Article 86. "No servant shall be put off, for above a year, to any other, neither in the lifetime of their master, nor after their death by their executors or administrators, unless it be by consent of authority assembled in some court or two assistants."

Article 87. "If any man smite out the eye or tooth of his man servant or maid servant, or otherwise maim or much disfigure him, unless it be by mere casualty, he shall let them go free from his service, and shall have such further recompense as the court shall allow him."

Article 88. "Servants that have served diligently and faithfully to the benefit of their masters seven years, shall not be sent away empty; and if any have been unfaithful, negligent, or unprofitable in their service, notwithstanding the good usage of their masters, they shall not be dismissed till they have made satisfaction according to the judgment of the authorities."

Three articles refer to 'liberties of foreigners and strangers'

Article 89. "If any people of other nations professing the true christian religion, shall flee to us from the tyranny or oppression of their persecutors, or from famine, wars or the like necessary or compulsory cause, they shall be entertained and succored among us, according to that power and prudence God shall give us."

Article 91. "There shall never be any bond slavery, villenage, or captivity amongst us, unless it be lawful captives taken in war, and such strangers as willingly sell themselves or are sold to us. And these shall have all the liberties and christian usages which the law of God, established in Israel concerning such persons, doth morally require. This exempts none from

servitude who shall be judged thereto by authority." (Laws. Cam., 1675, p. 10, tit Bond Slavery.)

Two articles, 'of the brute creature,' respecting cruelty to animals and certain rights of pasturage. Among the 'capital laws' in the remaining articles is one, Art. 94, s. 10: 'If any man stealeth a man, or mankind, he shall surely be put to death,' with marginal reference to Exodus, 21, 16. (Laws Camb. 1675, p. 15.)<sup>1</sup>

1652.<sup>2</sup> "And it is further ordered by this Courte and the authoritje thereof, that all Scotchmen, negroes, and Indjans, inhabiting with, or servants to the English \* \* shall be listed and \* \* attend traynings as well as the English," &c.

1656. Ordered by the Court, &c., "that henceforth no negroes or Indjans, although servants to the English, shall be armed or permitted to trajne."—Militia Regulations in Mass. Records IV. 1st Part, pp. 86, 397.

1659. The general court empowered the treasurers of the several counties to sell certain Quakers, who refused to pay fines "to any of the English nation at Virginia and Barbadoes."—2 Hazard's Coll. p. 563.<sup>3</sup>

1660. May. "This court, &c., do declare and order that no man whatsoever shall be admitted to the freedom of this body politick, but such as are members of some church of Christ and

<sup>1</sup> A transaction deserves mention in this place as indicative of the public sentiment at this period, which "has been magnified by too precipitate an admiration into a protest on the part of Massachusetts against the African slave trade." 1 Hild. p. 282. It was discovered in the year 1645, that two negroes who had been brought to Boston in a vessel which had sailed thence, 'bound to Guinea to trade for negroes,' had not been bought there in the regular course of traffic, but had been kidnapped on the coast of Africa, and that at the same time the crew, with others from some London vessels, had on a Sunday attacked an African village, and killed many of the inhabitants. The master and crew were charged with the offences of murder, man-stealing, and Sabbath-breaking. The magistrates were not sufficiently clear as to their authority to punish crimes committed on the coast of Africa; but they ordered the negroes to be sent back at the public charge, as having been procured not honestly by purchase, but by the unlawful act of kidnapping, and by a letter 'expressing the indignation of the General Court,' they bore 'witness against the heinous offence of man-stealing.' 2 Winthrop, 248 and Appendix M. 1 Banc. 174. Mass. Rec. II, pp. 186, 168.

<sup>2</sup> In 1649, a penal code was compiled and printed, no copy of which, it is believed, is now in existence. See 1 Hildr. 368.

<sup>3</sup> This order was never carried into effect, no ship-master being found willing to carry them away.—1 Sewel's Hist. Quakers, 8vo. p. 278.

in full communion, which they declare to be the true intent of the ancient law," [anno 1631.]—Charters, &c., p. 117.

**1664.** "In answer to that part of his Majesty's letter, of June 28, 1662, concerning admission of freemen; this Court doth declare that the law prohibiting all persons, except members of churches, and that also for allowance of them in any county court, are hereby repealed, and that all Englishmen presenting a certificate under the hands of the minister of the place where they dwell, that they are orthodox in religion and not vicious in their lives, and also a certificate under the hands of the selectmen, &c., that they are freeholders, &c., rateable, &c., or that they are in full communion with some church among us; if they desire to be freemen they shall be allowed the privilege to have such their desire propounded and put to vote for acceptance to the freedom of the body politick, by the suffrage of the major part, according to the rules of our patent."—Charters, &c., p. 117, IV. Mass. Rec. Part II. p. 117, and p. 56.<sup>1</sup>

The colonies of New Plymouth and Massachusetts Bay became, in the year 1692<sup>2</sup>, united into the Province of Massachusetts Bay.

**1698,** Laws of, c. 6.—A law forbidding to trade or truck with "any Indian, molato, or negro servant or slave, or other

<sup>1</sup> See the king's letter in IV. Mass. Rec. 2d part, p. 164–6, which enjoins "that all freeholders of competent estate, not vicious in conversation and orthodox in religion (though of different persuasions concerning church government) may have their votes in the election of all officers."

<sup>2</sup> The charter provided for election of deputies to the general court "by the major part of the freeholders and other inhabitants of the respective towns or places who shall be present at such elections." "No freeholder or other person" to have a vote, who should not have a certain freehold estate. "It contained a clause that all and every of the king's subjects "which shall go to and inhabit within" the province, and their children born there, should have the liberties, &c., of subjects in other parts of the empire. The governor and general court were vested with power to enact laws, "so as the same be not repugnant or contrary to the laws of this our realm of England."—Charters, &c., p. 18.

Charters, &c., p. 213, 229, gives enactments as of 1692, continuing the laws of Massachusetts and Plymouth colonies until the next year, founded on a doubt as to the continuance of the local law. (See 2 Hutch. p. 20,) and p. 214, *An act setting forth general privileges*, one of which is, "no freeman shall be taken and imprisoned, or be disseized of his freehold or liberties, or his free customs, &c., &c., but by the lawful judgment of his peers, or the law of this province." Also p. 224, *An act for the better securing of the liberty of the subject and for prevention of illegal imprisonment*. These acts, with some others there given, do not appear in the collections of the Province laws, printed in 1726 and 1759; they appear to have been disallowed by the Crown. See 1 Holmes' An. 440, n. 1 Hildr. 167.

known dissolute, lewd, and disorderly person, of whom there is just cause of suspicion," and such persons to be punished by whipping for so trading.

**1708**<sup>1</sup>, Laws of, c. 2.—An act restraining the emancipation of "molatto or negro slaves," without giving security to the town that they should not become chargeable. c. 4. An act that Indians, mulattoes, and negroes shall not be abroad at night after nine o'clock, &c.—Charters, &c., p. 745, 746.

**1705**, Laws of, c. 6.—*Act for the better preventing of a spurious and mixt issue.*<sup>2</sup> Enacts that a negro or molatto man committing fornication with "an English woman, or a woman of any other Christian nation," shall be sold out of the province. An "English man, or man of any other Christian nation," committing fornication with a negro or molatto woman, to be whipped, and the woman sold out of the province. "Any negro or mulatto presuming to smite or strike an English person, or of other Christian nation," to "be severely whipped." None of her Majesty's English or Scottish subjects, nor of any other Christian nation within this province, "shall contract matrimony with any negro or mulatto," under a penalty imposed on the person joining them in marriage. "No master shall unreasonably deny marriage to his negro with one of the same nation; any law, usage, or custom to the contrary notwithstanding." All negroes imported are to be entered and duty paid, a drawback to be allowed on exportation.—Charters, &c., p. 747.

**1707**,<sup>3</sup> Laws of, c. 2.—*An act for the regulating of free negroes, &c.*, enacts that they do service "in repairing the high-

<sup>1</sup> In 1701, the town of Boston instructed its representatives "to put a period to negroes being slaves."—3 Banc. 408.

<sup>2</sup> In a treatise by C. C. Jones, on the Religious Instruction of the negroes in the U. S.: Savannah, 1842, p. 35, are extracts from "Entryes for Publications (of marriage) within the town of Boston," date, 1707, 1710, publications of negroes, all as of certain masters there named."

<sup>3</sup> *Winchendon v. Hatfield* (1808), 4 Mass. R. 127-8, Parsons, C. J. "Slavery was introduced into this country soon after its first settlement. The slave was the property of the master, subject to his orders, and to reasonable correction for misbehavior. If the master was guilty of a cruel or unreasonable castigation of his slave, he was liable to be punished for the breach of the peace, and, I believe, the slave was allowed to demand sureties of the peace against a violent and barbarous master. Under these regulations, the treatment of slaves was in general mild and humane, and they suffered hardships not greater than hired servants."

ways, cleansing the streets, or other service for the common benefit of the place," equivalent to the service of others in training. In case of alarms, that they shall attend on parade and do services at the direction of the commanding officer. That free negroes and mulatto shall be fined for harbouring or entertaining "any negro or mulatto servant," without consent, &c. Punishment is prescribed, by commitment to the House of Correction.<sup>1</sup>

<sup>1</sup> Between the years 1767 and 1778, several unsuccessful attempts were made to procure legislative acts against the slave trade, an account of which is given by Dr. Belknap in his letter to Judge Tucker, vol. iv. Mass. Hist. Soc. Coll. p. 201. The latest attempts appear to have failed from the opposition of the governor, acting under his instructions. Dr. Belknap adds, "The blacks had better success in the judicial courts. A pamphlet containing the case of a negro who had accompanied his master from the West Indies to England, and had there sued for and obtained his freedom, was reprinted here, and this encouraged several negroes to sue their masters for their freedom and for recompense, for their service after they had attained the age of twenty-one years. The first trial of this kind was in 1770. The negroes collected money among themselves to carry on the suit, and it terminated favorably for them. Other suits were instituted between that time and the revolution, and the juries invariably gave their verdict in favor of liberty. The pleas on the part of the masters were, that the negroes were purchased in open market, and bills of sale were produced in evidence; that the laws of the province recognised slavery as existing in it, by declaring that no person should manumit his slave without giving bond for his maintenance, &c. On the part of the blacks it was pleaded that the royal charter expressly declared all persons born or residing in the province to be free as the king's subjects in Great Britain; that by the laws of England no man could be deprived of his liberty but by the judgment of his peers; that the laws of the province respecting an evil existing, and attempting to mitigate or regulate it, did not authorize it, and, on some occasions, the plea was, that though the slavery of the parents be admitted, yet no disability of that kind could descend to the children.

"During the revolution-war, the *publick* opinion was so strongly in favor of the abolition of slavery, that in some of the country towns votes were passed in town-meetings, that they would have no slaves among them, and that they would not exact of masters any bonds for the maintenance of liberated blacks, if they should become incapable of supporting themselves."

In a paper by Emory Washburn, Esq., read before the Mass. Hist. Soc. April, 1857, (Boston Daily Advertiser, July 8, 1857,) the title of the case above mentioned is given as *James v. Lechmere*. "The term at which the judgment in this action was rendered, was held in Suffolk, Oct. 31, 1769. The action was commenced in the Inferior Court of Common Pleas, May 2, 1769, and the plaintiff declared in trespass for assault and battery, and imprisoning and holding the plaintiff in servitude from April 11, 1758, to the date of the writ. Judgment in the lower court was rendered for the defendant. The plaintiff appealed, and in the superior court the defendant was defaulted, and judgment was rendered for an agreed sum with costs." Mr. Washburn says also; "If this were the place for speculation, I should feel myself warranted in assuming that our courts, as early as 1770, considered the attempt to hold any person not captured and brought and sold here, but *born here*, as a slave, was not justified by law, although he might be the child of a slave." But in *Winchendon v. Hatfield*, 4 Mass. R. 129, the court says: "It is very certain that the general practice and common usage had been opposed to the opinion that a negro born in the State, before the present constitution, was free, though born of a female slave." And see *Journal of Mass. Provincial Congress*, pp. 29, 302, a resolution of the Mass. Committee of Safety, of May 20, 1775, respecting the impropriety of enlisting slaves in the army; read in the congress, June 8, but no action taken on it.



**1712, Laws of, c. 6.**—*An act prohibiting the importation or bringing into this province any Indian servants or slaves.* The preamble recites the bad character of “Indians and other slaves,” the danger of their increase, and the “discouragement to the importation of white Christian servants;” enacts “that all Indians, male and female, of whatever age soever, imported or brought into this province by sea or land from any part or place whatsoever,” shall be forfeited to her majesty for the support of government, unless importers give security to remove them.—*Charters, &c.*, p. 748.

## § 221. LEGISLATION OF NEW HAMPSHIRE.

The colonial government of Massachusetts had claimed and exercised jurisdiction over the settlements within the limits of the present State of New Hampshire until the year 1679, when a separate provincial government was constituted under the royal commission.<sup>1</sup> The first legislative assembly declared “the general laws and liberties of this province,” and a code of capital laws compiled from the Massachusetts code; of which the twelfth is, “if any man stealeth mankind he shall be put to death or otherwise grievously punished.”—1 Belknap’s Hist. N. H. app. no. 26. This code “was rejected in England as ‘fanatical and absurd.’”—1 Hildr. p. 501.<sup>2</sup>

<sup>1</sup> The claim to the soil—antagonistical to that of Massachusetts—was founded on Mason’s Patent from the council of Plymouth, England. Whatever legislative power was derived from it was restructured by the usual condition of conformity to the laws of England. Local governments, founded on the written compacts of the settlers, had been formed at Exeter and Dover. 1 Belknap’s N. H. app. no. 12, 13. By the commission to Cutts and others, 1679, a legislative Assembly was allowed; the voters for delegates to be determined by the President and Council, and when “writs were issued for calling a general Assembly, the persons in each town who were judged qualified to vote were named in the writs,” 1 Belknap’s Hist. N. H. p. 91. The legislative power was not expressly limited, though subject to the royal disallowance of its enactments. It was provided in the grant of judicial power—“so always that the form of proceedings in such cases and the judgments thereupon to be given be as consonant and agreeable to the laws and statutes of this our realm of England, as the present state and condition of our subjects inhabiting within the limits aforesaid, and the circumstances of the place will admit.” The later commissions provide that the local shall “not be repugnant, but, as near as may be, agreeable to the laws and statutes of this our realm of England.” By the commission to Wentworth, 1766, the deputies to the Assembly are to be chosen by the “major part of the freeholders.” See the commissions in N. Hamp. Prov. Laws, edit. 1771, Story’s Comm. §§ 78—81.

<sup>2</sup> In a journal given in Belknap’s Hist. N. H. app. no. 44, as of 1683, “March 14.



1714, were passed—*An act for preventing men's sons or servants absenting themselves from their parents or master's service without leave.* N. H. Prov. Laws, c. 28. *An act to prevent disorders in the night,* Prov. Laws, c. 39.—“Whereas great disorders, insolencies and burglaries are oftentimes raised and committed in the night time by Indian negro and molatto servants and slaves, to the disquiet and hurt of her Majesty's good subjects; for the prevention whereof *Be it, &c.*—that no Indian, negro or molatto servant or slave may presume to be absent from the families where they respectively belong, or be found abroad in the night time after nine o'clock; unless it be upon errand for their respective masters,” &c.

— *An act prohibiting the importation or bringing into this Province any Indian servant or slaves.* Prov. L. c. 41—“Whereas divers conspiracies, outrages, barbarities, murders, burglaries, thefts, and other notorious crimes and enormities, at sundry times have of late been perpetrated and committed by Indians and other slaves within several of her Majesty's plantations in America, being of a malicious, surly, and revengeful spirit and very ungovernable, the over great number and increase whereof within this province is likely to prove of fatal and pernicious consequence to her Majesty's subjects and interest here, unless speedily remedied, and is a discouragement to the importation of Christian servants: *Be it, &c.*, that from and after the publication of this act, all Indians, male and female, of what age soever, that shall be imported or brought into this province by sea or land; every master of ship or other vessel, merchant or person, importing or bringing into this province such Indians male or female, shall forfeit to her Majesty for the support of the government, the sum of ten pounds per head, to be sued for and recovered in any of her Majesty's courts

The governor told Mr. Jaffrey's negro he might go from his master, he would cleave him under his hand and seal; so the fellow no more attends his master's concerns.”

<sup>1</sup> The royal instructions dated June 30, 1761, to B. Wentworth, the Provincial Governor, contained a clause,—“You are not to give your assent to, or pass any law imposing duties on negroes imported into New Hampshire.” Gordon's Hist. of Am. Rev. vol. V., letter 2.

of record, by action, bill, complaint or otherwise: to be paid into the treasury for the use aforesaid."

**1718.** *Act for restraining inhuman severities.* Prov. L. c. 70, a. 1—"For the prevention and restraining of inhuman severities which by evil masters or overseers, may be used towards their Christian servants, that from and after the publication hereof, if any man smite out the eye or tooth of his man servant or maid servant, or otherwise maim or disfigure them much, unless it be by mere casualty, he shall let him or her go free from his service, and shall allow such further recompense as the court of quarter sessions shall adjudge him. 2. That if any person or persons whatever in this province shall wilfully kill his Indian or negro servant or servants he shall be punished with death."

## § 222. LEGISLATION OF CONNECTICUT.

The civil polity of this colony originated in that of the two several colonies of Hartford and of New Haven. In January, 1639, a constitution of government was adopted for the Hartford colony,<sup>1</sup> by those who mutually recognized each other as the adult male free inhabitants of the settlements or townships of Hartford, Windsor and Wethersfield, agreeing "in all civil affairs to be governed according to such laws as should be made agreeably to the constitution they were then about to adopt,"

<sup>1</sup> 1775, Nov. 3. Resolution of Congress recommending the revolutionary Convention at Exeter (representing one hundred and two towns) to call "a full and free representation of the people," and that these representatives may establish such form of government, &c. 1 Belknap's N. H. pp. 357, 359, 361,—2. 1776, Jan. 5, vote of the Convention at Exeter, "that this Congress take up civil government for this colony, in the manner and form following," &c., Laws, 1780. Coll. N. H. Hist. Sec. IV., p. 150. There is no declaration of private rights.

1776, June 15. The Council and Assembly declared New Hampshire an independent State. 1 Bel. p. 367.

<sup>2</sup> The origin of the local government and the progress of legislation in Connecticut is sketched in the *advertisement* to the Public Statute Laws of the State of Conn., publ. Hartford, 1808. The towns of Hartford, Windsor and Wethersfield were first settled by emigrants from Massachusetts, the general court having in the year 1636 issued to Roger Ludlow and others, a commission investing them with legislative and judicial powers for one year in the new plantations, (intended to be within the limits and jurisdiction of Massachusetts,) and authorizing them to convene the inhabitants, if necessary, to exercise these powers in General Court. This commission was never renewed, but the persons named therein acted as magistrates until January, 1639. See also records of the colony, published by the State, 1850. Compare the remark in note 2, page 121.

and, "in cases in which there was no express law established, to be governed by the Divine word." The freemen of the colony, or those having the elective franchise, were to be such as had been received members of the several towns, by a majority of the inhabitants.

In June, of the same year, a constitution of government was adopted by the settlers at New Haven.<sup>1</sup> The Scriptures were received as having the authority of law in the absence of legislation.<sup>2</sup> Only members of the churches within the jurisdiction, could be freemen or electors. At Hartford, in April of the same year, the first law was passed, being a declaration or bill of rights, which is in nearly the same words as the preamble and first article of the Massachusetts Fundamentals of 1641. This bill of rights is repeated in the commencement of every revision of the colony laws.<sup>3</sup>

**1650.**—By order of the General Court of Hartford, &c., a digest of the statutes was "copied by the Secretary into the book of public records," which is frequently referred to in later statutes as the code of 1650.<sup>4</sup>

In this code under the title *Indians*, the lawfulness of the slavery of both Indians and negroes is recognized by the general court, adopting in terms a "conclusion" of the Commissioners of the United Colonies of New England, dated Sept. 4, 1646. (1 Records, 531.)<sup>5</sup> This is not found in the revised

<sup>1</sup> Printed with the code of 1650, by Andrus & Judd, 1833, 18mo. The New Haven colonists came directly from England in the year 1638; they had no patent from the council in Plymouth, in England, for New England. The territory of Connecticut had been granted by a patent then held by the Lord Say and Seale, and others.

<sup>2</sup> It is said that about the year 1750, the Hebrew *lex talionis* was applied under this enactment, in the case of a negro slave for the mutilation of his master's son. Peter's Hist. Conn., p. 83.

<sup>3</sup> The reference to the word of God is thus modified, "or in case of the defect of a law in any particular case, by some clear and plain rule of the word of God, in which the whole court shall concur."

<sup>4</sup> Col. Records of Conn., vol. I., p. 509, 563. See abstract in 1 Hildr. 371.

<sup>5</sup> 1643, May.—A confederacy to be known as the United Colonies of New England was entered into at Boston by delegates from Plymouth, Connecticut and New Haven, and the General Court of Massachusetts. 2 Hazard, 1—6. Among the articles of agreements, the eighth is as follows:

[a] "It is also agreed that the commissioners for this confederation, hereafter at their meetings, whether ordinary or extraordinary, as they may have commission or opportunity, do endeavor to frame and establish agreements and orders in general cases of a civil nature, wherein all the plantations are interested, for preserving peace among themselves, and preventing as much as may be, all occasions of war, or differ-

aws of 1715, which contain many provisions "for the well ordering of the Indians."

mces with others, as about free and speedy passage of justice in each jurisdiction to all the confederates equally, as to their own, receiving those that remove from one plantation to another without due certificates, how all the jurisdictions may carry it towards the Indians, that they neither grow insolent nor be injured without due satisfaction, lest war break in upon the confederates through miscarriages. [b.] It is also agreed that if any servant run away from his master into any of these confederate jurisdictions, that in such case, upon certificate of one magistrate in the jurisdiction out of which the said servant fled, or upon other due proof, the said servant shall be delivered either to his master or any other that pursues and brings such certificate or proof. [c.] And that upon the escape of any prisoner or fugitive for any criminal cause, whether breaking prison or getting from the officer, or otherwise escaping, upon the certificate of two magistrates of the jurisdiction out of which the escaped made, that he was a prisoner or such offender at the time of the escape, the magistrate or some of them, where for the present the said prisoner or fugitive abideth, shall forthwith grant such warrant as the case will bear for the apprehending of any such person and the delivery of him into the hand of the officer or other person who pursueth him; and if there be help required for the safe returning of any such offender, then it shall be granted unto him that craves it, he paying the charges thereof."

The same provisions are incorporated into the seventh article of the confederation, renewed in 1672. (2 Haz. p. 523.) The preliminary agreement [a] is however differently worded. "It is also agreed that the commissioners for this confederation hereafter at their meetings, whether ordinary or extraordinary, as they may have commission or opportunity, may consult of and propose to the several general courts, to be by them allowed and established, such orders in general cases," &c., the rest as in the article of 1643.

In certain instructions given by the commissioners, 5th Sept., 1646, (2 Hazard, p. 63,) after reciting the conduct of certain Indians, is said "it was therefore concluded, that in such cases the magistrates of any of the jurisdictions, might at the plaintiff's charge, send some convenient strength of English, and, according to the nature and value of the offence and damage, seize and bring away any of that plantation of Indians that shall entertain, protect, or rescue the offender, though it should be in another's jurisdiction, when, through distance of place, counsel or direction cannot be had, after notice and due warning given them as abettors, or at least accessory unto the injury and damage done to the English, only women and children to be sparingly seized, unless known to be some way guilty. And because it will be chargeable keeping Indians in prison, and if they should escape, they are like to prove more insolent and dangerous after, it was thought fit that, upon such seisure, the delinquent or satisfaction be again demanded of the sagamore or plantation of Indians guilty or accessory as before, and if it be denied, that then the magistrates of the jurisdiction deliver up the Indians seized to the party or parties endamaged, either to serve or to be shipped out and exchanged for negroes as the cause will justly bear."

In a correspondence, 2 Hazard, pp. 57, 69, between Governor Kieft of New Netherlands and the Commissioners for the United N. E. Colonies, 1646, the latter claim, "an Indian captive, liable to publicke punishment, fled from her master at Harford, is entertained in your house at Harford, and though required by the magistrate is under the hands of your agent there denyed, and we heare she is either marryed or abused by one of your men; such a servant is parte of her master's estate, and a more considerable part than a beast: our children will not longe be secure if this be suffered." The answer of Kieft is,—“Soe far as concernes the Barbarian handmaide, although it be apprehended by some that she is no slave, but a free woman, because she was neither taken in war nor bought with price, but was in former time placed with me by her parents for education, &c.”

In the inter-colonial treaty of Sept. 19, 1650, it is agreed that the same way and course shall be observed betwixt the English United Colonies and the Dutch, within the province of New Netherlands, as, according to the eighth article of confederation (of the N. E. Col.) is in that case provided. 2 Hazard, 172.

Under the title *Masters, Servants, Sojourners*, servants are forbidden, under penalty, to trade without permission of master, and provision is made for their recapture by public authority if running away; refractory servants are to be punished by the extension of their terms. 1 Records, 539, among the *Capital Laws*, 10, "If any man stealeth a man or mankind he shall be put to death, Exodus 21, 26." 1 Records, 77. The preamble is the same as in the Massachusetts Fundamentals.

**1660**, May 17. At a court held at Hartford—"It is ordered by this court, that neither Indian nor negro servants shall be required to traine, watch or ward in this Colonie." 1 Records, 349.

**1662**. The several colonies of Hartford, &c., and of New Haven, became united under one government, under the Charter for Connecticut, granted by Charles II.<sup>1</sup>

**1677**, May 10. At a court of Election held at Hartford—"This court, for the prevention of those Indians running away that are disposed in service by the Authority, that are of theemie and have submitted to mercy, such Indians, if they be taken, it shall be in the power of his master to dispose of him as a captive by transportation out of the country," &c. 2 Records, 308.

**1708**. *An act to prevent receiving goods from slaves, &c.* (Rev. L. of 1715, p. 135.) *An act for punishing, &c.*—"Whereas negro and mulatto servants and slaves are very apt to be turbulent, and often quarrell with white people," &c., enact that any such, disturbing the peace and offering to strike any white person, shall, on conviction, be punished with whipping, &c. (Rev. L. 1715, p. 138.)

**1711**. *An act relating to slaves, and such in particular as*

<sup>1</sup> By this the freemen of the colony were authorized to choose new associates, a governor and legislative assembly. The grant of legislative power is—"to ordain and establish all manner of wholesome and reasonable laws, &c., not contrary to the laws of this realm of England." It is provided that "all and every the subjects of us, our heirs or successors, which shall go to inhabit within the said colony, and every of their children which shall happen to be born there, or on the seas in going thither or returning from thence, shall have and enjoy all liberties and immunities of free and natural subjects, within any of the dominions of us, our heirs and successors, to all intents, constructions and purposes whatsoever, as if they and every of them were born within the realm of England." 1 Trumbull, 249; 2 Records.

*shall happen to become servants for time*, enacts “that all slaves set at liberty by their owners, and all negro, mulatto, and Spanish Indians, who are servants to masters for time, in case they shall come to want after they shall be so set at liberty or the time of their service be expired”—they shall be relieved at the cost of their masters. Rev. L. 1715, p. 164.

1715,—the date of a revision of the Laws: in which, *an act concerning arrests for debt*: that the debtor, “if no estate appear, he shall satisfy the debt by service, if the creditor shall require it, in which case he shall not be disposed in service to any but of the English nation,” p. 5 of Rev. continued in the later revisions.<sup>1</sup>

— *An act relating to freemen*. Persons desiring to become “freemen of this corporation,” having a certificate of the selectmen that they are persons of quiet and peaceable behavior and civil conversation, of the age of twenty-one years, and freeholders—to be admitted on taking the oaths, p. 40 of Rev.

— *An act to prevent the running away of Indian and negro servants*, p. 87 of Rev.

— *An act prohibiting the importation or bringing into this colony any Indian servants or slaves*. “Whereas divers conspiracies, outrages, barbarities, murders, burglaries, thefts and other notorious crimes, at sundry times, and especially of late, have been perpetrated by Indians and other slaves, within several of his Majesties plantations in America, being of a malicious and revengeful spirit, rude and insolent in their behaviour and very ungovernable; the over great number of which, considering the different circumstances of this colony from the plantations in the islands, and our having considerable numbers of the Indians, natives of the country, within and about us, may be of pernicious consequence to his Majesties subjects and interests here; unless speedily remedied,”—enacts “all Indians brought into this colony, to be disposed of or sold here, to be forfeited to the treasury of the colony unless the importers give security to re-export,” p. 209 of Rev.

<sup>1</sup> Mr. Hildreth, 1 Hist. U. S. 372, says this provision is in the code of 1650.

**1720.** *An act to prevent such as have made their escape from justice, or have been convicted of certain crimes in other colonies from making their abode in this colony.* Reprint 1737, p. 258. Continued and modified, in later laws, see ed. Laws 1810, p. 359, note. Rev. 1750, p. 106 ; 1784, p. 110.

**1723.** *An act to prevent the disorder of negro and Indian servants and slaves in the night season.* Reprint 1737, p. 291.

**1725.** That delinquents under penal laws may be “disposed of in service to any inhabitant of the colony,” to defray the expense of their prosecution. Repr. 1737, p. 314.

**1727.** An act requiring masters and mistresses of Indian children to use their “utmost endeavours to teach said children to read English, and to instruct them in the principles of the Christian faith.” Same, p. 339.

**1730.** *An act for the punishment of negro, Indian, and mulatto slaves for speaking defamatory words.* To be punished, on trial before a justice, by whipping, not exceeding forty stripes; “and the said slave, so convict, shall be sold to defray all charges arising thereupon ; unless the same be by his or their master or mistress paid and answered.” Same, p. 375.

**1750.** *An act to prevent such persons abiding, and hiding in this colony, as make their escape from justice, or are convicted of certain crimes in other colonies.* After providing for their expulsion, as in the act of 1720, contains a provision, “that if any such person or persons flying, or making escape, as aforesaid, be pursued by order of proper authority, from any other Government, in order to bring him or them to justice, he or they may be apprehended by order of the authority of this Government. And if, on examination and enquiry into the matter, it shall appear such person or persons have been convicted, as aforesaid, and are escaped, or are flying from prosecution as aforesaid, he or they may be remanded back and delivered to the authority or officers from whom such escape is made, in order that due and condign punishment may be inflicted on such transgressors.” Rev. of 1750, p. 106.

**1774.** October. Act against importation of slaves—“No Indian, negro, or mulatto slave shall at any time hereafter be



brought or imported into this State, by sea or land, from any place or places whatsoever, to be disposed of, left or sold, within this State."<sup>1</sup>

1776, October. The charter of 1662 made the constitution of the State of Connecticut,<sup>2</sup> and its sovereignty declared. Laws 1784, p. 1.

## § 223. LEGISLATION OF RHODE ISLAND.

The earliest legislation of a distinct colonial character, within the limits of the present State, is that of an Assembly consisting of the collective freemen of the various settlements or so called *towns*, then known as the "Providence Plantations;" convened at Portsmouth, in Rhode Island, May 19, 20, 21; 1647. These "Acts and Orders" contain provisions in the nature of private law, though embodied with declarations of public law, or political constitution. Among these the following may be noted as particularly connected with the subject of this chapter:<sup>3</sup>

<sup>1</sup> See *Jackson v. Bulloch*, 12 Conn. Rep. 42, for a judicial exposition of the history of slavery in the colony and State, also Reeves' *Domestic Relations*, 340.

<sup>2</sup> In view of this, Mr. Bancroft, *Hist. U. S.* vol. i., p. 402, says, "but the people of Connecticut have found no reason to deviate essentially from the frame of government established by their fathers. No jurisdiction of the English monarch was recognized; the laws of honest justice were the basis of their commonwealth, and therefore, its foundations were lasting." Considering the reputation of the earlier legislation of Connecticut as a restraint on the liberty of the subject, it may be well to refer the curious reader to the statutes of 1715, respecting the observance of the Lord's day and for the suppression of immorality and irreligion—p. 206 of the first edition of the *State laws*.

<sup>3</sup> In the legislation above cited the charter granted by the Earl of Warwick, Lord High Admiral, and others, Commissioners under the authority of Parliament, March 14, 1643, was expressly referred to as a source of political power. This charter gave to the "inhabitants of the towns of Providence, Portsmouth and Newport, a free and absolute Charter of incorporation to be known by the name of the Incorporation of Providence Plantations, &c., together with full power and authority to rule themselves, and such others as shall hereafter inhabit, &c., by such a form of civil government, as by voluntary consent of all, or the greater part of them, they shall find most suitable, &c. Provided nevertheless that the said laws, &c., &c., be conformable to the laws of England, so far as the nature and Constitution of the place will admit." (*Records of the Col.* edited by J. R. Bartlett, 1856, vol. I. p. 148, 156.) But the persons who acted as the freemen, or who assumed to be these *inhabitants*, were those who as members of the several towns or settlements—Providence, Portsmouth, Newport, and Warwick,—had, in the name of the majority, declared themselves the "freemen" or "free inhabitants." Those of the first-named three towns had, for some years before, exercised civil power in their several settlements. The inhabitants of Warwick, had not assumed such a power, which they contended was illegal: but, though not mentioned in the Charter, they appeared in the Assembly of 1647. (*Rec-*

“It was ordered, upon the request of the Commissioners of the town of Providence, that their second instruction should be granted and established unto them, viz., ‘We do voluntarily assent and are freely willing to receive and be governed by the laws of England, together with the way of the administration of them, so far as the nature and constitution of this plantation will admit, desiring, so far as may be possible, to hold a correspondence with the whole colony,’ &c. 1 R. I. Col. Rec. p. 147. Also under the title *Touching Laws*, in four heads, the first of which is,—“That no person in this colony shall be taken or imprisoned, or disseised of his lands and liberties, or be exiled, or any otherwise molested or destroyed, but by the lawful judgment of his peers, or by some known law, and according to the letter of it, ratified and confirmed by the major part of the General Assembly, lawfully met and orderly managed.” 1 R. I. Col. Records, 157.

“*Touching the Common Law*, it being the common right among common men, and is profitable either to direct or correct all without exception; and it being true, which that great Doctor of the Gentiles once said, that the law is made or brought to light, not for a righteous man, who is a law unto himself, but for the lawless and disobedient in the general, but more particularly for murderers of fathers and mothers, for manslayers, for whoremongers, and those that defile themselves with mankind, for manstealers, for liars and perjured persons, unto which, upon the point may be reduced the common law of the realm of England,<sup>1</sup> the end of which is, as is propounded, to preserve every man safe in his own person, name and estate, we do agree to make or rather to bring such laws to light for the direction or correction of such lawless persons; and for their memory’s sake to reduce them to these five general laws or heads,” &c., &c. 1 Records, 158.

ords, vol. I. pp. 27, 45, 52, 87, 129; 2 Douglas’ Summary, p. 80. Staples’ Annals of Prov. p. 55.) This Assembly declared—“the form of government established in Providence Plantations is democratical; that is to say, a government held by the free and voluntary consent of all or the greater part of the free inhabitants.” 1 Records, 156.

<sup>1</sup> This definition may be attributed to the Antinomian doctrines of the great majority of the first settlers, 1 Douglas’ Summary, p. 444, note.

*Debts, &c.* "But he [the debtor] shall not be sent to prison, there to lie languishing to no man's advantage; unless he refuse to appear or to stand to their order." 1 Records, 181.

Under *Breach of Covenant* it is enacted that servants shall not depart from service before the expiration of the time agreed, &c. 1 Records, 183.

**1652.** "Whereas, there is a common course practised amongst Englishmen to buy negers, to the end that they may have them for service or slaves forever; for the preventing of such practices among us, let it be ordered, that no blacke man-kind or white being forced by covenant bond or otherwise, to serve any man or his assignes longer than ten yeares, or untill they come to bee twentie-four yeares of age, if they be taken in under fourteen, from the time of their cominge within the liberties of this collonie. And at the end or terme of ten years to set them free as the manner is with English servants. And that man that will not let them goe free, or shall sell them away elsewhere, to the end that they may bee enslaved to others for a long time, hee or they shall forfeit to the collonie forty pounds." 1 Records, 241, 243.

**1675.** "The legislature<sup>1</sup> passed this order that 'no Indian in this Colony be a slave, but only to pay their debts, or for their bringing up, or custody they have received, or to perform covenant, as if they had been countrymen, not in war.' Some of the Indian captives were, however, in the great Indian war of 1675-6, sold by the Colony; not for life, however, but for a

<sup>1</sup> Under the then existing form of government this act operated only in the towns of Providence and Warwick, by whose Commissioners it was enacted. According to a Report upon Abolition Petitions made by Elisha R. Potter, of Kingstown, in the R. I. Legislature, Jan. 1840, this is the first legislative notice of the subject. It never obtained the force of a general law. 1 Banc. 174. 1 Hildr. 373.

<sup>2</sup> This was under the Charter of Charles 2d, 1663, which declared that certain persons named, "and all such others as now are, or hereafter shall be admitted free of the Company and Society of our Colony of Providence Plantations, in the Narraganset Bay, in New England, shall be from time to time, and forever hereafter, a body corporate and politick, in fact and name, by the name of the Governor and Company of the English Colony of Rhode Island and Providence Plantations," &c., and provided for an assembly of deputies to be elected "by the major part of the Freemen of the respective places, towns, or places," &c., "such laws, &c., be not contrary and repugnant unto, but, as near as may be, agreeable to the laws of this our realm of England, considering the nature and constitution of the place and people there." 2 Hazard, 612.

term of years, according to their circumstances, and for their protection." 2 R. I. Col. Rec. 535, 549. Staples' An. Pr. 70.

1700. It was declared, "that in all actions, matters, causes and things whatsoever, where no particular law of the colony is made to determine the same, then in all such cases the laws of England shall be put in force to issue, determine and decide the same, any usage, custom or law to the contrary notwithstanding." R. I. Col. Laws (Edit. 1744), p. 28. 1 Story's Comm. 64, cites p. 192.

1714. "We find an act passed to prevent slaves running away."

1715. "An act was passed, to prohibit the importation of *Indian* slaves into this colony. This act was continued in force and re-enacted in the digest of 1766. It states in the preamble that the increase of their number discourages the immigration of white laborers."

1728. "An act was passed requiring persons manumitting mulatto or negro slaves, to give security against their becoming a town charge." E. R. Potter's Report.

1750. An act was passed to prevent all persons from entertaining Indian, negro or mulatto servants or slaves, or trading with them. (See Rev. L. of 1798, p. 612.)

1770. *An act for breaking up disorderly houses kept by free negroes and mulattoes, and for putting out such negroes and mulattoes to service.* (See Rev. L. of 1798, p. 611.)

1774, June. "An act was passed, prohibiting the importation of negroes into this colony, the preamble of which we will quote ;—'whereas, the inhabitants of America are generally engaged in the preservation of their own rights and liberties, among which that of personal freedom must be considered as the greatest, and as those who are desirous of enjoying all the advantages of liberty themselves should be willing to extend personal liberty to others,' &c. By this act<sup>1</sup> all slaves,

<sup>1</sup> This act originated in a Providence town meeting, at which also it was resolved, "whereas Jacob Shoemaker, late of Providence, died intestate and hath left six negroes, four of whom are infants, and there being no heir to the said Jacob, in this town or colony, the said negroes have fallen to this town by law, provided no heir should

ter brought into the State were to be free except slaves  
ions travelling through the State, or persons coming from  
British colonies to reside here. Citizens of Rhode Island  
; slaves, were forbidden to bring slaves into the colony,  
they gave bond to carry them out again in a year. This  
ion was however expressly repealed in February, 1784.  
Potter's Report.

76, May. The General Assembly repealed the *Act for  
re effectual securing to his Majesty the allegiance, &c.* A  
declaration of Independence. Staples' Annals of Prov.

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## 24. LEGISLATION OF NEW YORK.

Whatever local law affecting personal condition or status  
have been derived from the Dutch government, within  
limits afterwards included in the British province of New  
York, on general principles, have continued after the es-  
tablishment of the English authority, until changed by positive  
legislation. The general principles on which the slavery of  
Negroes and Indians was recognized in the other colonies, were  
also recognized there under the law of Holland, which com-  
mended those doctrines derived from the civil law,<sup>2</sup> which

Therefore, It is voted by this meeting, that it is unbecoming to the character  
of the State to enslave the said negroes, and they do hereby give up all claim of right  
in them the said negroes or either of them," &c., &c. See Staples' An-  
nals; p. 237.

For the history of slavery in the N. E. colonies and States, see 2 vol. of Elliot's  
New England.

The civil law was the common law of the Dutch empire.—1 Thompson's Hist.  
of the Netherlands, p. 108. The treatise of Van Leeuwen, written in the latter part of the  
seventeenth century, transl. London, 1820, under the title, Comm. on Roman-Dutch Law,  
has been received in the colonies settled by Holland. In this work, B. I. c. 5,  
with respect to persons, every one is free among us by their birth, and slavery  
is not in use among us and not in use, so that in order to protect natural liberty, slaves  
brought here from other countries are declared to be free as soon as they  
reach the limits of our countries, notwithstanding their masters." (Noting Christi-  
anides, Grotius, Zypæ, &c., as cited in the next chapter.) Van Der Linden  
of the Laws of Holland, pub. 1806, transl. by J. Henry, London, 1828, for  
the colonies, says, B. i. § 3, "The difference between freemen and slaves, which  
is so large a part of the Roman law, does not exist in our country, where all  
are born free. Slavery is not in use in this country; nay, even the slaves who  
come from the Indies become free (ipso facto) by their landing, provided they are  
not runaway slaves or fugitives." But in the introductory part of the work the same author  
notices the Roman law of slavery and manumission as being applicable in  
the colonies.

have been set forth in the fourth chapter. There is, probably, no legislative enactment proceeding from the local authority to which the condition of slavery, under the Dutch government, can be attributed. The personal condition of the free white inhabitants, under private law, was not essentially different from that of the English in the other colonies, and the same distinction of race which existed in all the European colonies, of that time, must be taken to have limited the terms of any acts of the new government extending to the inhabitants the rights and privileges of free persons under the English law of condition.<sup>1</sup>

**1664.**<sup>2</sup> The first local legislation under the English government was that published under the authority of the Duke of York, as proprietor,<sup>3</sup> and known in the history of the colony as "the Duke's Laws." This code was promulgated from East Hampton, in the eastern part of Long Island, which was settled principally by persons of English origin, who had before endeavored to incorporate themselves with the Connecticut colony,<sup>4</sup> and seems to have been modelled after the existing New England codes. It is entitled, "Laws collected out of the several laws now in force in his majestie's American colonies and plantations." It has been published in vol. i. of the Collections of the New York Historical Society, p. 307. It contains, under the caption, *Bond Slavery*—"No Christian shall be kept in bond slavery, villenage, or captivity, except such who shall be judged thereunto by authority, or such as willingly have sold or shall sell themselves, in which case a record of such servitude shall be entered in the court of sessions held for the jurisdiction where such masters shall inhabit, provided that nothing in the

<sup>1</sup> The third of the Articles of Capitulation, 1664, Aug. 27, declares, "All people shall still continue free denizens and shall enjoy their lands, houses, goods, wheresoever they are within this country, and dispose of them as they please." See 2 Revised Laws of 1813, Appendix L.

<sup>2</sup> The patent to the Duke, dated March 16, 1664, for the lands lying between the Connecticut and Delaware rivers, granted to him, "his heirs, deputies, agents, commissioners, and assigns," "full and absolute power and authority," &c. So always as the said statutes, ordinances, and proceedings be not contrary to, but, as near as conveniently may be, agreeable to the laws, statutes, and government of this our realm of England."—Leaming and Spicer's Coll. p. 8. A second grant was made in similar terms, in 1674, L. & S. p. 41.

<sup>3</sup> See 2 Hazard's Coll. pp. 7, 18, 173, 248, 484. <sup>4</sup> Thompson's Hist. of Long Island, p. 117-126.

law contained shall be to the prejudice of master or dame who have or shall by any indenture or covenant take apprentices for term of years, or other servants for term of years or life."

Under the caption *Capital Laws*, art. 7, "If any person forcibly stealeth or carrieth away any mankind he shall be put to death."

Under the caption *Fugitives*, "Every apprentice and servant that shall depart or absent themselves from their master or dame, without leave first obtained, shall be adjudged by the court to double the time of their such absence, by future service, &c."

Caption, *Masters, Servants, and Laborers*, among other provisions declares, "If any servant shall run away from their master or dame, or any other inhabitants shall privily convey them away, or upon suspicion of such evil intentions, every justice of the peace," &c., is authorized to pursue such persons.

"No servant, except such as are duly so for life, shall be assigned over to other masters or dames by themselves, their executors, or administrators for above the space of one year, unless for good reasons offered the court of sessions shall otherwise think fit to order."

The word slaves is not used in this collection of laws; servants are distinguished only as being bound for years or for life.<sup>1</sup>

**1683.** In this year a local assembly was allowed by the Duke, and a governor sent out by him; an act of this date entitled, *An act for naturalizing all those of foreign nations at present inhabiting within this province and professing Christianity, and for encouragement for others to come and settle within the same*, (recited in an act of 1715, Bradford's Laws, p. 125,) contains the provision, that "nothing contained in this act is to be construed to discharge or set at liberty any servant, bondman, or slave, but only to have relation to such persons as are free at the making hereof." Under date October 30, is a "charter of the libertys and privileges granted by his Royal Highness to the inhabitants of," &c. "Freemen" are repeatedly

<sup>1</sup> See abstract of this code in 2 Hildr. pp. 44-51.



mentioned herein, but the term is not defined. This charter was probably repealed. See vol. ii. Revised Laws, 1813, app. No. 2.

**1691**, April 9. Session of the first colonial assembly, whose acts are binding. (Smith's Hist. of N. Y., p. 100.) May 6. *An act declaring what are the rights and privileges of their majesties' subjects inhabiting within their province of New York*, very similar to the above charter, contains a provision, "that no freeman shall be taken and imprisoned or be disseised of his freehold, or liberty, or free customs," &c., &c.—Bradford's Laws, p. 2—4. This act was repealed by the crown in 1697.—Smith's Hist. p. 76, notes; Smith and Livingston's Laws, ed. 1752, p. 5.

**1702.**<sup>1</sup> *An act for regulating slaves*. (Bradford's L. ed. 1726, vol. i. p. 45.) The captions are: Not lawful to trade with negro slaves. Masters may punish their own slaves. Not above three slaves may meet together. A common whipper to be appointed. A slave not to strike a freeman. Penalty for concealing slaves. If negroes steal, how satisfaction is to be made. Evidence of negroes, how far good. Enacted for one year, but appears to have been revised and continued in force at least until 1726.

**1705.** *An act to prevent the running away of negro slaves*,

<sup>1</sup> In 1702 Lord Cornbury was appointed governor of New York and the Jerseys under certain "instructions" from the crown. See Leaming and Spicer's Coll. pp. 612-642. Art. 16, provides for the revision of laws. 49. "You are to take care that no man's life, member, freehold, or goods be taken away or harmed in our said province, otherwise than by established and known laws, not repugnant to, but as near as may be, agreeable to the laws of England." 53. Directs a census, mentioning *slaves*; also, after enjoining encouragement of merchants, and in particular the Royal African Company of England; "And whereas we are willing to recommend unto the said company, that the said province may have a constant and sufficient supply of merchantable negroes at moderate rates, in money or commodities, so you are to take especial care that payment be duly made," &c., "and you are yearly to give unto us and to our commissioners for trade and plantations an account of what number of negroes our said province is yearly supplied with, and at what rates." "You shall endeavour to get a law past for the restraining of any inhuman severity, which by ill masters or overseers may be used towards their Christian servants and their slaves, and that provision be made therein that the wilfull killing of Indians and negroes may be punished with death, and that a fit penalty be imposed for the maiming of them." "You are also, with the assistance of the council and assembly, to find out the best means to facilitate and encourage the conversion of negroes and Indians to the Christian religion."

*out of the city and county of Albany, to the French at Canada.—*  
Bradford's L. p. 60.

**1706.**—*An act to encourage the baptizing of negro, Indian, and mulatto slaves.* Bradf. L. p. 65. "Whereas divers of her majesty's good subjects, inhabitants of this colony, now are, and have been willing that such negroe, Indian, and mulatto slaves, who belong to them, and desire the same, should be baptized, but are deterred and hindered therefrom by reason of a groundless opinion that hath spread itself in this colony, that by the baptizing of such negro, Indian, or mulatto slave, they would become free, and ought to be set at liberty. In order therefore to put an end to all such doubts and scruples as have, or hereafter at any time may arise about the same—*Be it enacted, &c.*, that the baptizing of a negro, Indian, or mulatto slave shall not be any cause or reason for the setting them or any of them at liberty.

"*And be it, &c.*, that all and every negro, Indian, mulatto and mestee bastard child and children, who is, are, and shall be born of any negro, Indian, or mestee, shall follow the state and condition of the mother and be esteemed, reputed, taken and adjudged a slave and slaves to all intents and purposes whatsoever.

"*Provided always, and be it, &c.* That no slave whatsoever in this colony, shall at any time be admitted as a witness for or against any freeman in any case, matter or cause, civil or criminal, whatsoever."

**1708.**—*An act for preventing the conspiracy of slaves.* Bradf. L. p. 68.

**1712.**—*An act for preventing, suppressing and punishing the conspiracy and insurrection of negroes and other slaves.* Bradf. L. p. 81. In addition to the provisions of act of 1702, are more stringent enactments against concealing slaves—their entertainment by free negroes. Enacts that no negro, Indian or mulatto that shall hereafter be made free, "shall hold any land or real estate, but the same shall escheat." Provisions for security on emancipation, for trial of slaves for crimes by two

justices and five freeholders : but may have a jury at the charge of the owner, &c.

**1715.**—*An act declaring, &c., and for naturalizing all Protestants of foreign birth, now inhabiting within this colony.* Bradf. L., p. 124. Refers to the letters patent to the Duke of York, permitting the introduction of foreigners as colonists; also to the articles of the surrender of the province, relating to the allegiance and rights of the inhabitants, and recites the act of 1683 : above-mentioned declares all persons of foreign birth, being Protestants inhabiting the colony, to be natural subjects and entitled to the privileges of such, makes no exclusion of any.

**1716.**—*An act for explaining and rendering more effectual an act, &c., (the act of 1712 above-mentioned.)* Bradf. L., p. 135.

**1730.**—*An act for the more effectual preventing and punishing the conspiracy and insurrection of negroes and other slaves ; for the better regulating of them, and for repealing the acts therein mentioned relating thereto.* Livingston & Smith's Laws, vol. I., p. 193.

**1740.**<sup>1</sup>—An excise act, Liv. & S., vol. I., p. 281. The first twelve sections relate principally to slaves whose importation is encouraged by the terms of sec. 9.

**1753. c. 27.**—A similar act. 2 L. & S., p. 21.

**1773.**—*An act to prevent aged and decrepid slaves from becoming burdensome within this colony.* Ed. fo. 1774, p. 764, Rev. c. 1508.

**1775.**—May 22, a Provincial Congress assembles.

## § 225. LEGISLATION OF NEW JERSEY.

**1664.**—After the acquisition of New York and New Jersey by the English, the earliest local government in the latter colony was founded on the grant of political powers to the Duke of York as proprietor, 1664, by him conveyed in the same year to

<sup>1</sup> In 1741-'2, a so-called "negro plot" or conspiracy was supposed to have been formed by the slaves in the city of New York ; an account of the trial and execution of several negroes accused, was published by Horsmanden.

arkley and Carteret, and by other public acts confirmed to them and their grantees. See Leaming & Spicer's Coll., 8, 11, 145.<sup>1</sup> In the first Proprietary Articles of Concession, &c., *servants, slaves, and Christian servants* are spoken of. L. & S., p. 12, and in laws passed in 1668, L. & S., 82.

**1675.**—An act provided punishments for transporting, harboring, or entertaining apprentices, servants and slaves. L. & S., 109.

**1676.**—The divisions of East and West Jersey established by the proprietors, each having a several government and legislative assembly. The laws of East Jersey in 1682, which contain a guarantee of personal liberties in the terms of Magna Carta, L. & S., 240, also contain laws against entertaining fugitive servants and trading with negro slaves. L. & S., 238, 239.

**1694, c. 2.**—*An act concerning slaves*, contains the common police regulations in respect to them. L. & S., 340. **1695, c. 3,** *An act concerning negroes*, provides for trial of "negroes and other slaves, for felonies punishable with death, by a jury of twelve persons before three justices of the peace; for theft, before two justices; the punishment by whipping." L. & S., 346. In the legislation of West Jersey, slaves are not named. A law of 1676, c. 23, providing for publicity in judicial proceedings, concludes "that all and every person and persons inhabiting the said province, shall, as far as in us lies, be free from oppression and slavery." L. & S., 398. Servants and runaway servants are mentioned, p. 306, 477; selling rum to negroes and Indians is forbidden, p. 512.

**1702.**—Surrender by the proprietors of East and West Jersey to the Queen, of their rights of government. L. & S., 9, 617. The province being then placed with New York under the government of Lord Cornbury. See *ante*, p. 280, note.

**1704.**—*An act for regulating negroe, Indian and mulattoes within the province of New Jersey*. Tabled as disallowed in a list of such laws. 1 Neville's Laws, 465.

<sup>1</sup> See limitations of legislative power in the grant; *ante*, p. 278, n. 2.

**1713.**—*An act for regulating slaves.* (1, Nev. L., c. 10.)  
 Sect. 1. Against trading with slaves. 2. For arrest of slaves being without pass. 3. Negro belonging to another province, not having license, to be whipped and committed to jail. 4. Punishment of slaves for crimes to be by three or more justices of the peace, with five of the principal freeholders, without a grand jury; seven agreeing, shall give judgment. 5. Method in such cases more particularly described. Provides that “the evidence of Indian, negro, or mulatto slaves shall be admitted and allowed on trials of such slaves, on all causes criminal.” 6. Owner may demand a jury. 7, 8. Compensation to owners for death of slave. 9. A slave for attempting to ravish any white woman, or presuming “to assault or strike any free man or woman professing Christianity,” any two justices have discretionary powers to inflict corporal punishment, not extending to life or limb. 10. Slaves, for stealing, to be whipped. 11. Penalties on justices, &c., neglecting duty. 12. Punishment for concealing, harboring, or entertaining slaves of others. 13. Provides that no negro, Indian, or mulatto that shall thereafter be made free, shall hold any real estate in his own right, in fee simple or fee tail. 14. “And whereas it is found by experience that free negroes are an idle, slothful people, and prove very often a charge to the place where they are,” enacts that owners manumitting, shall give security, &c.

*An act for laying a duty on negro, Indian, and mulatto slaves imported or brought within this province.* Allinson's Laws, c. 50, laid a duty of ten pounds on every slave limited to seven years.

*An act for regulating of white servants and taking up soldiers and seamen deserting, &c.* Neville's L. c. 11. By sec. 7 persons from neighboring provinces suspected, &c., must produce a pass, from a Justice, “signifying that they are free persons,” otherwise to be committed to gaol, to be “delivered by order of their captain, master, mistress, or other due course of law.”

**1730.** *An act imposing a duty on persons convicted of heinous crimes and to prevent poor and impotent persons being*

*ed into this province, and for the amendment of the law  
g to servants.* Nev. L. c. 57.

**51.** *An act to restrain tavern-keepers and others from  
strong liquors to servants, negroes and mulatto slaves,  
prevent negroes and mulatto slaves from meeting in  
companies, from running about at night, and from hunt-  
carrying a gun on the Lord's day.* Nev. L. c. 112.

**54.** Nev. L. c. 119, § 10, provides for the Borough of  
eth — any white servant or servants, slave or slaves,  
shall “be brought before the Mayor, &c., by their mas-  
other inhabitant of the Borough, for any misdemeanor  
or disorderly behavior, may be committed to the work-  
to hard labor and receive correction not exceeding thirty  
”

**60** An act for enlisting soldiers, &c., Nev. L. c. 141, sec.  
ides against enlistment of any “young man under the age  
nty-one years, or any slaves who are so for terms of life,  
rentices,” without leave of their masters, &c.

**58.** *An act to regulate the trial of slaves for murder  
her crimes and to repeal so much of an act, &c.* Allinson,  
**75.** Sec. 1, 2, provides for trial of slaves by the ordinary  
criminal courts. 3. That the expenses of the execution,  
all be levied on order of the justices from the owners of  
-bodied slaves in the county. 4. Repeals sec. 4, 5, 6, 7, of  
; of 1713.

**69.** *An act laying a duty on the purchasers of slaves  
ed into this colony.* Allinson's L. c. 494. Recites—  
reas duties on the importation of negroes in several of  
ighboring colonies hath, on experience, been found bene-  
a the introduction of sober industrious foreigners, to set-  
ler his Majesty's allegiance, and the promoting a spirit of  
ry among the inhabitants in general, in order therefore  
note the same good designs in this government and that  
purchase slaves may contribute some equitable propor-  
the public burdens :” provides for a duty, and also for  
securities on the manumission of slaves.

reference to these acts as indicating the legality of slavery, in *State v. Post*,  
*Van Buren*, 1 Zabriskie's R. 368, 378.

**1776, July 2.** A constitution adopted for the colony 4, declares all inhabitants of full age, who are worth pounds, entitled to vote; 21, 22, declares the common England and the former statute law of the province to force. Wilson's ed. Laws 1784.

## § 226. LEGISLATION OF PENNSYLVANIA.

Settlements had been made on the western bank Delaware, by the Dutch and Swedes, but the soil had before claimed by the British crown, and the governors of York, under the patent to the Duke had claimed jurisdiction over the territory: but the first local legislation was from the charter to Penn in 1680.<sup>1</sup>

**1681, July 11**—the date of certain Conditions and cessions agreed upon by W. Penn, Proprietary, &c., and who are the adventurers and purchasers in the same per Charters and Acts, &c., ed. 1762, vol. i. p. 6, 7, of which connection with the subject, sections 13, 14, 15, may

<sup>1</sup> The fourth section grants to the Proprietary and his heirs and deputies making laws, "according to their best discretion by and with the advice, and approbation of the freemen of the said country or the greater part of them," fifth specifies other legislative judicial and executive powers with the proviso the same laws be consonant to reason and not repugnant or contrary, but (as conveniently may be) agreeable to the laws, statutes and rights of this our England, and saving and reserving to us, &c., the receiving, hearing, and determining of the appeal and appeals of all or any person or persons of, in or belonging to territories aforesaid, or touching any judgment to be there made or given sixth gives power to the Proprietor to make ordinances "for the preservation of peace as for the better government of the people there inhabiting, so that ordinances be consonant to reason and be not repugnant nor contrary, but, so far as conveniently may be, agreeable with the laws of, &c., and so as the said ordinances not extended, in any sort, to bind, charge, or take away the right or interest of any person or persons for or in their life, members, freehold, goods or chattels" Laws of Pa. fo. p. 1, 6. The requisites of the condition of a 'freeman,' are in grant or charter of liberties, by Penn, 25 Ap. 1682; Laws agreed upon for the land, &c. (Append. to editions of Prov. Laws.) 2. That every inhabitant shall be purchaser, &c., and every person that hath been a servant or bondsman is free by his service, that shall have taken up his fifty acres, &c., and every tenant, artificer, or other resident in the said province, that pays scot and taxes to the Government, shall and may be capable of electing or being elected representative of the people in provincial council or General Assembly in the said Province." Votes and Proceedings, I. p. 3, admitting certain Swede, Finn and Dutch to be freemen, and the act of Union (annexing the three counties which afterwards constituted the Province and State of Delaware, (in the Append. to Prov. L.) in which the following occurs—"And forasmuch as there must always be a people before there can be a government, and the people must be united and free, in order to encourage them," &c.



ticed, providing for the punishment of injuries done to the Indians, that the planter injured by them, "shall not be his own judge upon the Indian," and for a judicial determination of controversies arising between the planters and the natives by a jury consisting of six persons of each race, &c., &c.

1682. Laws agreed upon in England : provide, sec. 23,—  
 "That there shall be a register for all servants, where their names, time, wages, and days of payment shall be registered."  
 29 — "That servants be not kept longer than their time, and such as are careful be both justly and kindly used in their service, and put in fitting equipage at the expiration thereof, according to custom." Province Laws, App. 1, 2.

1700. "Fourth mo. 1. The bill number 5 regulating negroes in their morals and marriages, &c., was read the first time and put to the vote whether it should pass into a law? carried in the negative." Votes & Proc. I. p. 120.<sup>1</sup> Memoirs Hist. Soc. Penn. vol. i. p. 367,—Bettle's Notices.

'1700. *An act for the better regulation of servants in this province and territories.* The captions are—"No servant to be sold out of this government without his consent. Nor assigned over except before a Justice. The allowance to servants at the expiration of their servitude. And shall serve five days for every day's absence from their master, &c. The reward for taking up Runaways, &c., and the penalty for concealing them. The Penalty on the Justice for neglect, as also on the Sheriff. Likewise for dealing with servants or negroes, &c. For this and for the following citations, see the various editions of the Province Laws of Pa.

— c. 26. *An act about departers out of this Province.* Persons leaving are required to procure a pass.—Prov. L. c. 132.

— c. 29. *An act for the trial of negroes.* The captions —Two Justices commissioned by the Governor, with the assistance of six freeholders, to try negroes for murder, &c. Their

<sup>1</sup> 2 Hildr. 505. "The assembly refused to assent to Penn's proposition for the legal marriage and instruction of slaves, but passed a rigid police law for the regulation and punishment of negro slaves."

<sup>2</sup> For the history of the various changes in the frame of Government before this date, see Preface to the Votes and Proceedings. 2 Hildr. 68, 67, 205, 207.

qualification and manner of proceeding thereon. Their duty and power to acquit or condemn. How sentence to be given and execution done. Punishment for rape. For stealing. Negroes not allowed to carry a gun or other arms. Nor to meet above four in company on penalty of whipping.—Prov. L. c. 134.

— c. 30. *An act to prevent the importation of Indian slaves.* “Whereas the importation of Indian slaves from Carolina or other places hath been observed to give the Indians of this province some umbrage for suspicion and dissatisfaction. *Be it, &c.*, that if after the twenty-fifth day of March, in the year 1706, any person shall import or cause to be imported, any Indian slaves or servants whatsoever, from any province or colony in America into this province, by land or water, such only and their children (if any) excepted as for the space of one year before such importation shall be proven to have been menial servants in the family of the importer, and are brought in together with the importer’s family, every such slave or servant so here landed shall be forfeited to the Government and shall be either set at liberty or otherwise disposed of, as the Governor and council shall see cause.”

“Provided always that no such Indian slave as deserting his master’s service elsewhere, (that shall fly into this Province,) shall be understood or be construed to be comprehended within this act.”—Prov. L. c. 136.

— c. 39.<sup>1</sup> *An act about arrests and making debtors pay by servitude.*—Prov. L. c. 165.

— c. 50. *An act for raising revenue.* An import duty laid on negroes, among other merchandise specified.—Prov. L. c. 166.

1710, c. 14. *An act laying a duty on negroes, wine, rum and other spirits.* Repealed in council, 1713.—Prov. L. c. 172.

1711-12, c. 10. *An act to prevent the importation of negroes and Indians into this Province.* Lays a prohibitory duty on negroes and Indians; allows a drawback or re-exportation.

<sup>1</sup> These acts of 1705—chapters 26, 29, 30, 39, appear to have been enacted in 1701, but disallowed by the king’s council.

n twenty days ; an indulgence to travellers, of two slaves each ; unaways, if taken back within twenty days, to be free of duty ; otherwise, if not claimed within twelve months, they were to be sold. Repealed by the Queen's council.—Prov. L. c. 183 ; (see note, p. 209, note from Burge.)<sup>1</sup>

**1714**, c. 19. *An act for laying a duty on negroes imported to this Province.* Repealed in council, 1719.—Prov. L. c. 19.

**1717**, c. 5. *An act for continuing a duty on negroes brought to this Province.* “Expired,”—Prov. L. c. 222.

**1721**, c. 1. In this act, which regulates public houses, &c., s. 4, negroe or Indian *servants* are spoken of, but not slaves ; the margin has the term *slaves*.—Prov. L. c. 23.

— c. 2. *Act respecting fires*, last section, “and if such offender be a negro or Indian slave he shall, instead of imprisonment, be publicly whipped at the discretion of the magistrate.”—Prov. L. c. 235.

**1721-2**, c. 1. *An act for imposing a duty on persons convicted of heinous crimes and imported into this province as servants or otherwise.* Prov. L. c. 237. Repealed, 1729, c. 8, 21.

**1722**, c. 3. *An act for laying a duty on negroes imported to this Province.* “Expired.”—Prov. L. c. 239.

**1725**, c. 1. Similar title. “Expired.”—Prov. L. c. 276.

— c. 4. *An act for the better regulating of negroes in this Province.* Captions :—Value of negro put to death for crime, now allowed to owner. Masters importing negroes to report them to collector. Whoever lets free any negroe shall give security. The third section enacts, “and whereas it is found by experience that free negroes are an idle, sloathful people, and then prove burthensom to the neighborhood, and afford ill examples to other negroes, Therefore be it enacted, &c., That if any master or mistress shall discharge or set free any negroe, he or she” shall give recognizance &c., “but until such recogni-

<sup>1</sup> In 1712 to a general petition for the emancipation of negro slaves by law, the Legislature of Pennsylvania answered that ‘it was neither just nor convenient to set them liberty.’—8 Banc. 408.

zance is given such negroes shall not be deemed free." The security shall be given for negroes set free by will, or the said negroes shall not be free.—"That if any free negroe, fit to work, shall neglect so to do and loiter and misspend his or her time, or wander from place to place, any two Magistrates next adjoining are hereby impowered and required to bind out to service, such negroe, from year to year, as to them may seem meet."—Slaves under the age of twenty-one to be bound out.—No free negro or mulatto to harbor or entertain any negro, Indian or mulatto slave,—nor trade with any such.—"That if any free negroe or mulattoe shall refuse or be unable to pay his or her Fine or Forfeiture as aforesaid, it shall and may be lawful to and for the Justice before whom such matter is tried to order Satisfaction by Servitude." "That no minister, pastor or magistrate, or other person whatsoever, who, according to the laws of this province, usually join people in marriage, shall upon any pretence whatsoever join in marriage, any negroe with any white person, on the penalty of one hundred pounds." Whites and blacks cohabiting—the white shall pay a fine, and the black be sold as a servant. The remaining sections prescribe penalties for negroes absent from home at night, &c. Prov. L. c. 288.

**1729**, c. 5. *An act for laying a duty on negroes imported, &c.*, rep. by 1761, c. 10, s. 16.—Prov. L. c. 297.

— c. 8. *An act laying a duty on Forreigners and Irish servants &c., imported into this Province*—repealed by 1729, 2d sess., c. 7, s. 9.—Prov. L. c. 298.

**1742**, c. 3. *An act imposing a duty on persons convicted of heinous crimes brought into this province, and not warranted by the laws of Great Britain, &c.* Repealed by the royal council.

**1761**, c. 10. Supplementary to an act of 1729, c. 5. A similar law, 1767–8, c. 3. 1 Laws of the Commonwealth of Pa. c. 428, 429.

**1767–8**, c. 3, continues the last above, "expired."

**1771**, c. 8. An act supplementary to an act of 1770, respecting servants. 1 Laws Commonw. Pa. c. 636.

**1773**, c. 11. *An act making perpetual the act intituled, A*

*act for laying a duty on negroes and mulatto slaves, &c., and laying an additional duty on the said slaves.* 1 Commonw. Laws, c. 692, (repealed 1780. Ibid. c. 881.)

**1776**, June 14.—The Provincial Congress instructed their delegates in the Continental Congress to confer with the other colonies in political separation from Great Britain, “reserving to the people of this colony the sole and exclusive right of regulating the internal government of the same.”—*Votes and Proceedings*, vol. vi., 740.

## § 227. LEGISLATION OF DELAWARE.

The territory occupied by the State of Delaware was first occupied by the Dutch.<sup>1</sup> Their claim had always been denied by the English, though on the grant of New Netherlands to the Duke of York, it was occupied by his representatives as a portion of his proprietary dominion. In 1682, Aug. 21, the Duke ceded his territory to Penn, and it became included in his government.—See the “Act of Union,” in *Votes and Proceedings*, vol. i., p. 3, and *ante* p. 286, note.—*Delaware Laws*, ed. 1797, c. 5.

In 1703, Penn surrendered the old form of government, and gave the Delaware Counties the option of a separate administration, under “the Charter of Privileges,” having a separate legislature, though one Governor and Council with Pennsylvania.—*Del. Laws*, ed. 1797, appendix.

**1721.** *An act for the trial of Negroes.* Del. L. c. 43. Sec. 1. Two justices and six freeholders empowered to try “negro or mulatto slaves” accused of heinous offences specified. 2. Such court may determine and order execution. When slaves are put to death two-thirds of value to be paid to owner. 3, 4.

<sup>1</sup> The first settlements in this vicinity were by the Swedes and Danes, before the year 1638. Stevens, in *Hist. of Georgia*, p. 288, says that in the Swedish and German colonies, founded on the Delaware by Gustavus Adolphus, it was held “not lawful to buy or keep slaves,” but gives no authority. In a translation of the Danish Laws of Christian V., published in London, 1756, “for the use of the Danish colonies in America,” ch. xii. of Book iii. is omitted, since “it regards vileanage, consequently of no use in the American islands.” But ch. xiv., *Of Bondsmen*, is given in full, though such as are there described are bound to the soil, though hereditary, and could not be sold or removed by the lord. In Book iii. ch. ii., *Of Privileges*, “Whoever enjoys the privilege of power, of life or limb on his servants, or ecclesiastical or civil patronage, or any other privilege granted by the king, shall use it, and shall not be deprived of it on account of abuse.”

Duties of Sheriffs, &c. 5. Punishment for rape of white woman—standing on pillory and cutting off both ears. 6, 7. Slaves forbid to carry arms ; negroes forbid meeting in companies.

**1721.** *An act against adultery and fornication.*—Del. L., c. 44, sec. 5. Servant women having bastards—to serve another year. 9. Penalty on white women that shall bear mulatto children. The child to serve under appointment of county court, until the age of thirty-one years. (Repealed 1795, D. L., c. 71.) 10. Penalty on white men committing fornication with negro or mulatto women. (Fines and corporal punishment, for fornication and bastardy, abrogated, 1795, D. L., c. 108, s. 7.)

**1789.** *An act imposing a duty on persons convicted of heinous crimes, and to prevent poor and impotent persons being imported, &c.*—D. L., c. 66.

— *An act for the better regulation of servants and slaves within this Government.*—D. L., c. 77. Sec. 1. No indentured servant to be sold into another Government without the approbation of at least one justice, &c. 2. Nor assigned over unless before a justice. 3. Nor indentures taken, &c. 4–10. Police regulations regarding servants, similar to those of other colonies. 10. Whoever manumits a slave, to give security, &c. 11. The children of free negroes to be bound out if their parents do not maintain them. The remaining sections contain the ordinary police regulations for slaves.

**1751.** An act supplementary to the last.—D. L., c. 129.

**1760.** Another supplementary act, D. L., c. 170. Sec. 1. “Whereas the children of white women by negro or mulatto fathers, and the descendants of such children, and negroes entitled to their freedom, are frequently held and detained as servants or as slaves, by persons pretending to be their masters and mistresses, when they ought not by the laws of this government be so held and detained, and frequently are sold as slaves by such pretended masters or mistresses to persons who reside in other governments, with a fraudulent design to prevent their procuring proof of their being entitled to their freedom ; and whereas the laws of this Government are defective in not pre-

scribing any mode for settling and determining in a short and summary manner the claim or right of any persons pretending to be entitled to their liberty." 2. Enacts that the courts of Common Pleas may, upon petition, summon the master or mistress and witnesses before them, and, "after hearing the proofs and allegations of the parties in a summary way," if they are satisfied that the person petitioning is entitled to freedom, shall discharge him or her from the service, &c. 3. Their judgment to be enforced by the Sheriff. 5. Provides a penalty for selling a free man "out of this Government."

**1767.** An act supplementary to the preceding.—D. L., c. 188. *Preamble.*—"Whereas it is found by experience, that free negroes and mulattoes are idle and slothful, and often prove burdensome to the neighborhood wherein they live, and are of evil example to slaves." Sec. 2. Restrains still further the manumission of slaves. 3. Provides punishment for a slave assaulting another slave.

## § 228. LEGISLATION OF NORTH CAROLINA.

The first legislation having territorial extent within the limits of the present States of North and South Carolina, was derived from certain Lords Proprietary, under the charters of 1663 and 1665.<sup>1</sup> Even before the year 1729, where the rights

<sup>1</sup> The first permanent settlements were made by emigrants from Virginia and New England. (2 Banc., 131-136.) By the first charter, 1663, art. 5, the proprietaries had property in the soil and supreme legislative power "according to their best discretion and with the advice, assent and approbation of the freemen of the said province, or of the greater part of them, or of their delegates or deputies, whom for the enactment of the said laws, &c." the proprietaries were to assemble; "provided nevertheless that the said laws be consonant to reason, and as near as may be conveniently agreeable to the laws and customs of this our kingdom of England." Art. 7, "that all and singular the subjects and liege people of us, &c., transported or to be transported into the said province, and the children of them and of such as shall descend from them, there born, or hereafter to be born, be and shall be denizens and lieges of us, &c., of this our kingdom of England," &c., and that they shall "possess and enjoy" "all liberties, franchises and privileges of this our kingdom, &c."

The charter of 1665 has similar clauses. 1 S. C. Statutes at Large, p. 24, 33.

The proprietaries adopted John Locke's Constitution, March 1, 1669, of which the following articles are of interest, in connection with the history of slavery in America; though it may be doubted whether the constitution ever had the force of a law, not having been adopted by the local assembly. See 1 S. C. St. at L., p. 41; it was definitively abrogated in 1693. 1 R. S. of N. Car., Pref. vii. It provided:

Art. 97. "But since the natives of that place, who will be concerned in our plantation, are utterly strangers to Christianity, whose idolatry, ignorance, or mistake



of the proprietaries were finally ceded to the crown, the northern and southern portions of the territory constituted distinct jurisdictions, each having a separate legislative assembly. They became formally distinguished as North and South Carolina, in the year 1732.

The legislative history of North Carolina begins with the year 1669.<sup>1</sup> (2 Banc., 151.) According to Iredell's Laws of N. C., from which the following notes of statutes are taken, the date of the earliest extant laws is 1715, of which year's laws, c. 31—*An act for the more effectual observing of the Queen's peace, &c.*, sec. 5, referring to the charter provision, states that disputes often arise how far the laws of England are in force; declares, "From thence it is manifest that the laws of England are the laws of this government, so far as they are compatible with our way of living and trade." "That the common law is, and shall be in force," except as to the practice of courts, and that all English statutes for maintaining the rights of the crown, the established Church, "and all laws providing for the privileges of the people," and certain others, shall be in force.

gives us no right to expel or use them ill; and those who remove from other parts to plant there will unavoidably be of different opinions concerning matters of religion, the liberty whereof they will expect to have allowed them, and it will not be reasonable for us on this account to keep them out; that civil peace may be obtained amidst diversity of opinions, and our government and compact with all men may be duly and faithfully observed; the violation whereof, upon what pretence soever, cannot be without great offence to Almighty God, and great scandal to the true religion which we profess; and also that Jews, Heathens and other dissenters from the purity of the Christian religion may not be scared and kept at a distance from it, but by having an opportunity of acquainting themselves," &c.

Art. 101. "No person above seventeen years of age shall have any benefit or protection of the law, or be capable of any place of profit or honor, who is not a member of some Church or profession, having his name recorded in some one, and but one religious record at once."

Art. 107. "Since charity obliges us to wish well to the souls of all men, and religion ought to alter nothing in any man's civil estate or right, it shall be lawful for slaves as well as others, to enter themselves, and be of what Church or profession any of them shall think best, and be as fully member as any freeman. But yet no slave shall hereby be exempted from that civil dominion his master hath over him, but be in all things in the same state and condition he was in before."

Art. 110. "Every freeman of Carolina shall have absolute power and authority over his negro slaves, of what opinion or religion soever."

For the early legislative history of the Carolinas, see Pref. vol. 1 of Rev. St. of North Car. Brevard's Observations. 1 S. C. Stat. at L. 425-429.

<sup>1</sup> At this time, according to 1 Williamson's Hist. of N. C., 122, n, "Taxables were every white male, aged sixteen years; and every slave, negro, mulatto or Indian, male or female, aged twelve years."—Comp. ante, p. 230.

Ch. 45. *An act concerning servants and slaves.*—The title only is given in Iredell's L.; *margin*, "Rep. by act April 4, 1741, c. 24." Ch. 59. An act respecting Indians, of which sec. 5 enacts, that any white man injuring an Indian "shall make full satisfaction to the party injured, and shall suffer such other punishment as he should or ought to have done, had the offence been committed by an Englishman." Ch. 66. An act repealing all laws not specially re-enacted.

**1720**, c. 5.—An act explaining the act concerning servants and slaves, the title of which only is given by Iredell, and in *margin*, "Rep. by Ap. 1741, c. 24."

**1723**, c. 5.—*An act for an additional tax on all free negroes, mulattos, mustees, and such persons, male or female, as now or hereafter shall be intermarried with any such persons resident in this government.* The title only given; *margin*, Rep. by acts, 1741, c. 24: 1760, c. 2.

**1741**, c. 1. *Act concerning marriages.*—Sec. 13. That white persons intermarrying with any negro, mustee, or mulatto man or woman, or any person of mixt blood to the third generation, bond or free, "shall pay fifty pounds forfeit."

—— c. 24. *An act concerning servants and slaves*, does not declare who are or shall be slaves; relates to treatment of indentured servants, and the police regulations for slaves most common in the various colonies. Sec. 18, provides for extension of the term of service of white servant women having bastard children; if by a negro, &c., such children shall be bound out until thirty-one years of age. 19. Mentions a peculiar class of servants imported, being tradesmen or workmen in some art, receiving *wages*, yet bound. 45. Such runaways may be declared outlawed, and thereupon lawfully killed by any person. 46. The conspiracy of three slaves made a felony. 56. That no negro or mulatto slaves shall be set free upon any pretence whatsoever, except for meritorious services, to be adjudged by the county court and license thereupon.

**1749**, c. 6. An act confirming, on revision, certain former acts, among which the acts of 1723 and 1741 above mentioned.

**1753**, c. 6. An additional act concerning servants and

slaves, principally providing for searching the houses of slaves for arms and stolen goods. Sec. 9. Allowance for slaves executed. (Rep. by 1786, c. 17.) 10. That if slaves, not being clothed and fed according to the intent of this act, shall steal corn, cattle, or goods, their owners shall be liable in damages to the person losing the same.

1758, c. 7. Another additional act as above, the title only given; *margin*, "Rep. by act, 1764, c. 8, and 1786, c. 17." By the former of these repealing acts it appears that the act in part provided that no male slave should, for the first offence, be condemned to death, unless for murder or rape, but for every other capital crime should, for the first offence, suffer castigation. The other sections provide compensation to the owners of slaves executed for crimes. The act of 1786, repealing these, recites, "Whereas many persons, by cruel treatment to their slaves, cause them to commit crimes for which many of said slaves are executed, whereby a very burthensome debt is unjustly imposed on the good citizens," &c.

1774, c. 31. *An act to prevent the wilful and malicious killing of slaves*,<sup>1</sup> provides for the first offence, twelve months' imprisonment, and for the second, death without clergy; the offender to pay to the owner the value of the slave. Proviso, that the act does not extend to outlawed slaves. See the act of 1791, on this matter, and *State v. Boon*, Taylor's N. C. R. 252.

1775, May 19. The so-called "Mecklenburg Declaration of Independence," in the name of "the citizens of Mecklenburg county." See the history of this in Rev. St. of N. C. vol. i. p. 5.; from its insertion in this publication it may be taken to have been adopted by the State as its own public act.

<sup>1</sup> *State v. Reed*, 2 Hawks' R. 454. An indictment for the murder of a slave, which concludes at common law is good. *State v. Hale*, 2 Hawks' R. 582. An indictment will lie at common law for battery of a slave by a stranger, i. e., not owner or hirer; comp. *State v. Mann*, 2 Devereux R. 263. In *Tate v. O'Neil*, 1 Hawks' R. 418, held, that patrols are not liable to the master for inflicting punishment on his slave, unless their conduct demonstrates malice against the master.

## § 229. LEGISLATION OF SOUTH CAROLINA.

Among the titles preserved in Trott's Laws of S. C. pp. 1, 2, 3, of certain early colonial acts, which are not now to be found, is one dated

**1682** or 1683, entitled *An act inhibiting the trading with servants or slaves*. This act was probably temporary, but was renewed by various acts, anterior to the revisory and now extant slave law of 1712. See 2 Statutes at Large, Introd. p. 5, and pp. 22, 52, 73, 118, also, *An act for servants arriving without indentures or contracts, and an act to prevent runaways*.—2 Stat. Introd. p. 5.

**1687**. *An act for servants hereafter arriving without indentures or contracts*.—2 Stat. L. p. 30.

**1690**. *An act for the better ordering of slaves*.—7 St. at L. 342. Sec. 1. Police regulations for negro or Indian slaves, provides for passes or tickets. Penalty for neglect to apprehend and punish runaways ; punishment of such slaves " offering any violence." 2. " That all slaves shall have convenient clothes once every year," and that no slave " shall be free by becoming a Christian," that slaves shall be deemed " as other goods and chattels " as to payment of debts, but " shall be accounted as freehold in all other cases, and descend accordingly." 3, 4, 6, 9. For the detention, treatment, &c., of runaways. 5. Houses of slaves to be searched for arms, &c., and stolen goods. 7. Penalty for attempting to steal or carry off any slaves the act made a felony. 8, 10, 11. Provide for the trial and punishment of slaves, by a justice and three freeholders, for crimes, misdemeanors, and insurrections. 12. " That if any slave, by punishment from the owner for running away or other offence, shall suffer in life or limb, no person shall be liable to the law for the same ; but if any one out of wilfulness, wantonness, or bloody-mindedness, shall kill a slave, " shall suffer three months' imprisonment," and pay fifty pounds to the owner ; no person liable for killing a slave stealing by night in his house, &c.

This act appears to have been temporary, but in substance re-enacted by various acts until the law of 1712. See 2 Stat. at L. pp. 49, 78, 121, 156, 182.

**1697.** *An act for the making aliens free of this part of this province and for granting liberty of conscience to all Protestants.*—2 St. at L. 131. The first section extends the rights and privileges “of persons born of English parents” to all alien inhabitants; but by the seventh its extent seems limited to certain French Protestants. An act of 1691, 2 St. at L. 58, also naturalizes certain of this class of aliens.

**1698.** *An act for the encouragement of the importation of white servants.*—2 St. at L. 153, recites, “whereas the great number of negroes, which of late have been imported into this colony may endanger the safety thereof, if speedy care be not taken and encouragement given for the importation of white servants.”

**1701.** *An act for the prevention of runaways deserting this government.*—2 St. at L. 180. This applies to all domiciled persons.

**1703.** An act laying duties, 2 St. at L. 200. Secs. 4, 5, designate the duty to be paid on negro slaves imported, and on Indian slaves exported. Further explained by act of 1706, 2 St. at L. 280.

**1704.** An act to regulate elections, 2 St. at L. 249. Sec. 1, provides a property qualification for voters, but no distinction of race is mentioned. Another act making aliens free of this part of the province.—2 St. at L. 251. Another *for raising and enlisting such slaves as shall be thought serviceable to this province in time of alarms.*—7 St. at L. 349, continued by later acts up to the act of 1712.

**1712.** *An act to put in force in this province the several statutes of the kingdom of England, or South Britain, therein particularly mentioned.*—2 St. at L. p. 401. In sec. 5, “that all and every part of the common law of England, where the same is not altered by the above enumerated acts, or inconsistent with the particular constitutions, customs, and laws of this province, excepting so much thereof as hath relation to the ancient tenures which are taken away, &c., is hereby enacted and declared to be of as full force in this province as if particularly enumerated by this act, &c.” Among the acts named are the great

charter, 9 Hen. 3. c. 29, which is recited, “no *freeman* shall be taken,” &c. The Habeas Corpus Act, 31 Car. 2, is not among the acts named. As to the law of slavery co-existent with the law of England in the colony, compare *White v. Chambers* (1796), 2 Bay’s R. 74.

**1712.** *An act for the better ordering and governing of negroes and slaves.*—7 St. at L. 352. “Whereas the plantations and estates of this province cannot be well and sufficiently managed and brought into use without the labor and service of negroes and other slaves; and forasmuch as the said negroes and other slaves brought unto the people of this province for that purpose are of barbarous, wild, savage natures, and such as renders them wholly unqualified to be governed by the laws, customs, and practices of this province; but that it is absolutely necessary that such other constitutions, laws and orders should in this province be made and enacted for the good regulating and ordering of them, as may restrain the disorders, rapines, and inhumanity to which they are naturally prone and inclined, and may also tend to the safety and security of the people of this province and their estates, to which purpose

1. “*Be it enacted, &c.*, that all negroes, mulattoes, mestisoos, and Indians, which may at any time heretofore have been sold, or are now held or taken to be, or hereafter shall be bought and sold for slaves, are hereby declared slaves, and they and their children are hereby made and declared slaves to all intents and purposes, excepting all such negroes, mulattoes, mustizoes, or Indians, which heretofore have been, or hereafter shall be, for some particular merit, made and declared free either by the governor and council of this province, pursuant to any act or law of this province, or by their respective owners or masters, and also excepting all such negroes, mulattoes, mustizos, or Indians as can prove that they ought not to be sold for slaves. And in case any negro, mulattoe, mustizoe or Indian, doth lay claim to his or her freedom, upon all or any of the said accounts, the same shall be officially heard and determined by the governor and council of this province.” Secs. 2, 3, re-enact provisions of the act of 1690, respecting runaways and searches for

arms and stolen goods. 4. Against trading with slaves. 5, 6. Forbidding to slaves use and access to fire-arms. 7, 8. Against meetings of slaves in and about Charleston. 9, 10, 12, 18. Provisions for the trial of slaves, similar to those in the act of 1690, and for new modes of punishment. 11. Penalty on owners for sending away slaves who have committed felonies. 13. Regulating the admission of the evidence of slaves against other slaves. 14. "Whereas divers evil and ill-disposed persons have hitherto attempted to steal away negroes or other slaves, by specious pretence of promising them freedom in another country, against which pernicious practice no punishment suitable hath yet been provided," provides punishment of the attempt by a fine, &c., and makes the act a "felony without benefit of clergy, and the offender shall suffer death accordingly." 15. "That in case any negro or slave shall run from his master or mistress, with intent to go off from this province, in order to deprive his master or mistress of his service, such negro or slave shall, on conviction, suffer death;" provides for punishment of slaves enticing other slaves to run away. 16. Provides for payment to the owners of slaves suffering death for crimes. 17. Punishment of slave striking or injuring any "Christian or white person." 19. Various new punishments for slaves running away for the first and other times. 20-27. Various provisions for the arrest and treatment of runaway slaves. 28, 29. Restraining owners in granting liberties to slaves and in their mode of employing them. 30. Similar to sec. 12, of the act of 1690. 31-33. Detailed provisions for the better enforcement of this act. 34. Provides "since charity and the Christian religion, which we profess, oblige us to wish well to the souls of all men, and that religion may not be made a pretence to alter any man's property and right, and that no person may neglect to baptize their negroes or slaves or suffer them to be baptized, for fear that thereby they should be manumitted and set free,"—"it shall be and is hereby declared lawful for any negro or Indian slave, or any other slave or slaves whatsoever, to receive and profess the Christian faith, and to be therein baptized; but that notwithstanding such slave or slaves shall receive or profess the Christian religion and



be baptized, he or they shall not thereby be manumitted or set free, or his or their owner, master, or mistress lose his or their civil right, property, and authority over such slave or slaves, but that the slave or slaves, with respect to his servitude, shall remain and continue in the same state and condition that he or they were in before the making of this act."

**1714.**—*An additional act to the above, 7 St. at L., 365, sec. 1, to facilitate punishment of slaves, gives to two justices and one freeholder, certain of the powers formerly vested in two justices and three freeholders. 2. Other of such powers given to a justice and two freeholders. 3. Compensation of marshal in certain cases. 4. Limits the amount to be paid for slaves executed for crime. 5. Reciting that "the executing of several negroes for felonies of a smaller nature" has been a great charge, enacts that except for murder, slaves condemned shall be transported, &c. 6. Punishment of slave for striking—discretionary with the judge, and the oath of the person struck, made sufficient to convict. 7, 8. Respecting dealing with slaves, stolen goods, &c. 9, 10. "And whereas the number of negroes do extremely increase in this province, and through the afflicting Providence of God, the white persons do not proportionably multiply, by reason whereof the safety of the said province is greatly endangered," &c., provides additional duties or importation. 11. That slaves shall not be allowed to plant for themselves certain articles or keep stock.*

**1716.**—*An act to encourage the importation of white servants into this province. 2. Stat. at L., 646. An act, &c., duties on negroes imported, Ibid., 651, secs. 3, 4, 5. An act to keep inviolate the freedom of elections, &c. 2 St. at L., 683, sec. 20 : qualifications of voters, "that every white man, and no other, professing the Christian religion," being of age and having certain property, may vote.*

**1717.**—*An act for the better governing and regulating*

<sup>1</sup> See the abstract of this act in 2 Hildr. p. 271, 275 ; the author observes here : "Then, as now, the legality of this legislation seems open to some question," referring to the charter provision that local laws should not be repugnant to the laws of England. Compare *ante*, § 214.

*white servants.* 2 St. at L., 14, contains provisions similar to those of Virginia and other colonies. Sec. 21 provides punishment of limited servitude for white women having children by negroes, and the same penalty for white men begetting children by blacks; the issue to be servants for limited times.

**1717.**—*A further additional act, &c.* 7 St. at L., 368, contains new provisions for compensation of the owners of slaves executed, and increases the import duty.

**1719.**—Another act laying duties on negroes, &c. 9 St. at L., 57, 69.

**1722.**—*An act for the better ordering, &c.*

**1735.**—An act under the same title. 7 St. at L., 371, 385. These acts, with great minuteness of detail, extend and re-enact the provisions of the former acts. Sec. 22 of the first act recites, "whereas, there is sometimes reason to suspect that slaves do run away for want of a sufficient allowance of provisions," gives power to justices to inquire, and enacts a penalty. Sec. 1 of the act of 1735, declaring who shall be slaves in terms similar to sec. 1 of 1712, "in case any negro, mulatto, mustee or Indian doth or shall lay claim to his, her, or their freedom, upon all or any of the said acts or otherwise, the same shall be finally heard and determined before the judges and justices of the Court of General Sessions, assize and gaol-delivery in this province, in open court, at the sitting of the same by a verdict of twelve men, and not otherwise." Sec. 35 requires provision to be made for the departure out of the province of manumitted slaves, &c. 36. Limits the quality of apparel to be furnished to slaves.

**1737.**—*An act for establishing and regulating patrols,* 3 St. at L., 456, recites the object of keeping in order the "negroes and other slaves."

**1738.**—An act respecting pedlars, and against their dealing with slaves. 3 St. at L., 487.

**1740.**—*For the better ordering and governing negroes and other slaves in this province.* 7 St. at L., p. 397. Whereas, in his majesty's plantations in America slavery has been introduced and allowed, and the people commonly called negroes,

Indians, mulattoes and mustezoes have been deemed absolute slaves and the subjects of property in the hands of particular persons, the extent of whose power over such slaves ought to be settled and limited by positive laws, so that the slave may be kept in due subjection and obedience, and the owners and other persons having the care and government of slaves may be restrained from exercising too great rigor and cruelty over them, and that the public peace and order of this province may be preserved ; we pray your most sacred majesty that it may be enacted.

“ *And be it enacted, &c.*—That all negroes and Indians, (free Indians in amity with this government, and negroes, mulattoes or mustezoes, who are now free, excepted,) mulattoes or mustezoes who now are, or shall hereafter be in this province, and all their issue and offspring, born or to be born, shall be and they are hereby declared to be, and remain forever hereafter absolute slaves, and shall follow the condition of the mother, and shall be deemed, held, taken, reputed and adjudged in law to be chattels personal, in the hands of their owners and possessors and their executors, administrators and assigns, to all intents, constructions and purposes whatsoever ; *provided always*, that if any negro, Indian, mulatto or mustezo shall claim his or her freedom, it shall and may be lawful for said negro, Indian, mulatto or mustezo, or any person or persons whatsoever, on his or her behalf, to apply to the justices of his majesty's Court of Common Pleas by petition or motion, either during the sitting of the said court, or before any of the justices of the same court at any time in the vacation ; and the said court or any of the justices thereof, shall, and they are hereby fully empowered to admit any person so applying to be guardian for any negro, Indian, mulatto or mustezo, claiming his or her, or their freedom ; and such guardians shall be enabled, entitled and capable in law, to bring an action of trespass in the nature of ravishment of ward, against any person who shall claim property in, or who shall be in possession of any such negro, Indian, mulatto or mustezo ; and the defendant shall and may plead the general issue on such action brought, and the special matter

may and shall be given in evidence, and upon a general or special verdict found, judgment shall be given according to the very right of the cause, without having any regard to any defect in the proceedings, either in form or substance ; and if judgment shall be given for the plaintiff, a special entry shall be made declaring that the ward of the plaintiff is free, and the jury shall assess damages which the plaintiff's ward hath sustained, and the court shall give judgment and award execution against the defendant for such damage, with full costs of suit ; but in case judgment shall be given for the defendant, the said court is hereby fully empowered to inflict such corporal punishment, not extending to life or limb on the ward of the plaintiff as they in their discretion shall think fit ; *provided always*, that in any action or suit to be brought in pursuance of the direction of this act, the burthen of the proof shall lay on the plaintiff ; and it shall be always presumed that every negro, Indian, mulatto and mustezo is a slave, unless the contrary can be made to appear, the Indians in amity with this government excepted, in which case the burthen of the proof shall be on the defendant ; provided also, that nothing in this act shall be construed to hinder or restrain any other court of law or equity in this province, from determining the property of slaves or their right to freedom, which now have cognizance or jurisdiction of the same, when the same shall happen to come in judgment before such courts, or any of them, always taking this act for their direction therein." Sec. 2. The defendant required to give recognizance. 3. No slave to be absent from home without a ticket. 4. Penalty for unauthorizedly giving a ticket. 5. Slave, without ticket, how dealt with ; provides that if such " shall refuse to submit to the examination of any white person, it shall be lawful for any such white person to apprehend and moderately correct such slave, and if any such slave shall assault and strike such white person, such slave may be lawfully killed." 6. Penalty for improperly beating a slave ; that is, beating by other than the master, and while lawfully employed : a pecuniary fine with power to commit until paid. 7. Assemblages of slaves to be dispersed, their houses searched for arms,

8. Persons damaged in taking runaway slaves, to be remunerated. 9. How slaves are to be tried for capital offences ; two justices and three freeholders, &c., one justice may issue warrant of commitment. The trial to be within three days after the apprehending of such slave. The said justices, &c., shall, after hearing evidence for and against, &c., finally "hear and determine the matter brought before them, in the most summary and expeditious manner ; and in case the offender shall be convicted of any crime for which by law the offender ought to suffer death, the said justices shall give judgment, and award, and cause execution of their sentence to be done by inflicting such manner of death and at such time as the justices, by and with the consent of the freeholders shall direct, and which they shall judge will be most effectual to deter others from offending in the like manner." 10. Trial for offences not capital, by one justice and two freeholders ; the judgment to be for the inflicting any corporal punishment, not extending to taking away life or member, as he and they in their discretion shall think fit ; and shall award and cause execution to be done accordingly." 11. What shall be a quorum of the court for the foregoing. 12. The oath to be administered to such justices, &c. 13. "That not only the evidence of all free Indians, without oath, but the evidence of any slave without oath, shall be allowed and admitted in all causes whatsoever, for or against another slave accused of any crime or offence whatsoever ; the weight of which evidence being seriously considered and compared with all other circumstances attending the case, shall be left to the conscience of the justices and freeholders." 14. The same provisions for trial of slaves shall be applicable to free negroes, &c. 15. Slaves convicted of crimes to suffer death, the manner according to the direction of the justices and freeholders.' 16. Certain crimes declared felony, committed by slaves, free negroes, &c., burning articles, the product of the province, stealing slaves to carry out of the province, poisoning any person. 17. Homicide and insurrec-

<sup>1</sup> The existence of laws for the trial of negroes, similar to that contained in the preceding sections, should be considered in reading the newspaper reports of such trials which often appear therein, like acts of lawless assemblies.

tion punishable with death. 18. Compensation to owners of slaves executed. 19. Justices may compel any to give evidence. 20. Penalty for concealing accused slave. 21. Duties of constables. 22. Penalty for working on Sunday. 23. Slaves not to carry fire-arms without a ticket. 24. Slaves who strike a white person, how to be dealt with. 25. Runaway slaves, how to be disposed of. 26. The duty of the wardens of the work-house. 27. Proceedings when apprehended runaway slave is delivered to warden, &c. 28. Slaves, in custody eighteen months, to be sold.<sup>1</sup> 29. Penalty on free negroes or slaves for harboring runaways. 30, 31. Slaves in Charleston not to buy or sell except, &c. 32, 33. Respecting selling liquors and giving tickets of leave to slaves. 34. Prohibits slaves from trading or keeping boats, horses, cattle, &c. 35. Slaves allowed to buy and sell provisions, &c., with a ticket. 36. Not to be absent, or to keep arms, horns, &c. 37. "And whereas, cruelty is not only highly unbecoming those who profess themselves Christians, but is odious in the eyes of all men who have any sense of virtue or humanity ; therefore to restrain and prevent barbarity being exercised towards slaves." That if any person shall "wilfully murder" his own or another's slave, he shall on conviction, forfeit seven hundred pounds, current money, and be incapable of holding office, &c. In case of inability to pay, to be kept at hard labor in the work-house, &c., for seven years. If any person shall, on sudden heat and passion, or by undue correction, kill his own slave, or another's, he shall forfeit three hundred and fifty pounds.<sup>2</sup> For mutilation, &c., or "cruel punishment, other than by beating with," &c., &c., the forfeiture of one hundred pounds. 38. Slaves to be provided with sufficient

<sup>1</sup> Many of the provisions in the laws of the various States applying to runaways may, with greater strictness in the usage of language, be said to apply to negroes who are either not proved to belong to some owner, or who cannot, when arrested, prove that they are not slaves, or their right to freedom. Compare Stroud, 2d ed. p. 181.

<sup>2</sup> State v. Gee, 1 Bay's R., 164, (1791,) by counsel for the State—"the frequency of the offence owing to the nature of the punishment." State v. Fleming, (1847) 2 Strobbart's R., 464, a case under a later act, (1821,) it was held that an indictment does not lie at common law for the homicide of a slave ; it is, in S. C., purely a statutory offence. Compare Stroud, p. 63. In White v. Chambers, (1796,) 2 Bay's R. 70, an action by the master for battery of the slave by a stranger, will lie under the customary law of the province and State ; even, it would seem, when there is no proof of a consequent loss of service.

thing and food, under penalty.<sup>1</sup> 39. "Whereas, by reason of the extent and distance of plantations in this province, the inhabitants are far removed from each other, and many cruelties may be committed on slaves, because no white person may be present to give evidence of the same," &c., enacts that if any slave shall suffer in life, limb or member, or be maimed, &c., contrary to the meaning of the act, and no white person able or willing to give evidence, then the owner or person having the custody of such slave, is to be deemed guilty of the offence, unless such owner or other person can make the contrary appear by evidence, "or shall, by his own oath, clear and exculpate himself," which oath shall discharge, "if clear proof of the offence be not made by two witnesses at least."<sup>2</sup> 40. Appeal to be allowed to slaves, its quality limited. 41. Against firing guns at night. 42. Slaves are not to rent houses or plantations. 43. No travel on the highway in numbers. 44. "And whereas, many owners, &c., do confine them so closely to hard labor, that they have not sufficient time for natural rest,"—that if any slave work slaves "more than fifteen hours in twenty-four, from March to September, and fourteen hours in twenty-four from September to March," they shall forfeit a sum not over twenty and not under five pounds. 45. "And whereas, the teaching slaves taught to write, or suffering them to be employed in writing, may be attended with great inconveniences,"—that any person who shall teach any slave to write or employ any slave as a scribe in any writing, shall forfeit one hundred pounds. 46. No person to keep slaves on a plantation without a white person with them. 47–50. Rewards for white persons bringing in alive, from Florida fugitive negroes, their scalps, in certain cases, &c., &c. 51–55. Penalty on persons failing to carry this act into execution, &c., &c. 56. Sanctions the unauthorized execution of certain negroes during a

<sup>1</sup> See under this act, in 1849, the State v. Bowen, 8 Strobhart's R. 578. Stroud's R. 49.

<sup>2</sup> State v. Welch, (1791.) 1 Bay's R., 172. No person can exculpate himself by his own oath, for killing a slave, not being the master, overseer, or some person having immediate charge of such negro.



previous rebellion. This act was for three years, but was re-enacted, and has continued to be, essentially, the principal law on this subject. 7 St. at L., 418, 425. Compare the abstract of its provisions in 2 Hildr., p. 421.

**1740.** *An act for the better establishing and regulating patrols.* 3 St. at L., 568. "Forasmuch as many late horrible and barbarous massacres have been actually committed, and many more designed, on the white inhabitants of this Province by negro slaves, who are generally prone to such cruel practices," &c. Sec. 8. Defines the duties and powers of the patrol men in respect to slaves. Enacted for three years, but probably revived in later acts.

**1743.** *An act for the better securing this Province against the insurrections and other wicked attempts of negroes and other slaves ; and for revising, &c.* 3 St. at L., 608.

**1744.** *An act for the better governing and regulating of white servants, &c.* 3 Stat. at L., 621.

**1745.** *An act amending and continuing the act of 1740,* 3 St. at L., 647.

**1751.** Additional and explanatory of the same act. 7 St. at L., 420.

— An act laying new duties on slaves imported. 3 St. at L., 739.

**1754.** An act to prevent slave-stealing, &c. 7 St. at L. 426.

**1764.** *An act for laying an additional duty upon all negroes hereafter to be imported, &c.* 4 St. at L., 187. Recites "Whereas an importation of negroes, equal in number to what have been imported of late years, may prove of the most dangerous consequence in many respects to this Province, and the best way to obviate such danger will be by imposing such an additional duty upon them as may totally prevent the evils."

**1775-76.** *An act to revive and continue certain acts,*

<sup>1</sup> In 1760, an act was passed by the Provincial Assembly to prevent the further importation of slaves, but was disallowed by the crown. The Governor of S. C. was rebuked for having assented to it, and a circular letter sent to all the other Governors, prohibiting their assent to similar act. 1 Burge's Comm. 737. The trade was declared to be "beneficial and necessary to the mother country." Stevens' Georgia, 285.

among which are the acts already described respecting slaves. 1 St. at L., 331, 348.<sup>1</sup>

1775. Nov.—to 1776 March—A Provincial Congress ; adopts a constitution for the State, does not contain any declaration of private rights. Art. 11, of elections ; “The qualification of electors shall be the same as required by law.”

### § 230. LEGISLATION OF GEORGIA.

The district lying between the Savannah and St. John's rivers had been included in the grant to the Lords Proprietary of Carolina. The laws which were enacted under their government for the portion of “Carolina south of Cape Fear,” may be supposed to have had territorial extent in the territory now occupied by the State of Georgia. The Proprietaries made reversion of their territory and jurisdiction in 1729 (*ante*, p. 293.) By a charter dated 9th June, 1732, a body corporate called ‘the Trustees for establishing the Colony of Georgia,’ in the district south and west of the Savannah river, was created ; their trust being limited to twenty-one years. This charter repealed the laws of South Carolina, in and for Georgia.<sup>2</sup>

The importation of indented servants was especially contemplated by the Trustees, but they prohibited the introduction

<sup>1</sup> The code of S. C., has been stringently coercive compared with those of the other colonies and slave-holding States ; not only by the immunity of power which it has given to the owners ; but also in the authority which it has conferred, and indeed imposed as an obligation, on each white inhabitant, in reference to the slaves and free persons of color. It illustrates, moreover, how, even in the superiority which is conferred upon him by law, the action of the free inhabitant, though not himself a slave-owner, may, in many respects, be restricted through the existence of a slave-class.

<sup>2</sup> See the charter in Stevens' Hist. of Ga., and the State Digest. It declares that “all and every the persons which shall happen to be born within the said Province, and every one of their children and posterity, shall have and enjoy all liberties, franchises and immunities of free denizens and natural born subjects within any of our dominions, as if abiding and born within this our kingdom of Great Britain, or any other dominion.” It also provided that “all and every person or persons who shall at any time hereafter inhabit or reside within our said Province, shall be and hereby are declared to be free, and shall not be subject to or be bound to obey any laws, orders, statutes or constitutions, which have been heretofore made, ordered and enacted, or which hereafter shall be made, &c., by, for or as the laws, orders, statutes or constitutions of our said Province of South Carolina, but shall be subject to and bound to obey such orders, &c., as shall from time to time be made, &c., for the better government of the said Province of Georgia, in the manner herein after declared. And we do hereby, &c., &c., that for and during the term of twenty-one years, to

of slaves.<sup>4</sup> It was soon however advocated by the wealthy planters. "A considerable number of negroes had been already introduced from Carolina, as hired servants, under indenture for life or a hundred years," and after a long controversy on the subject (2 Hildr. 360, 371,) the Trustees in 1747 "passed an ordinance allowing slavery with certain restrictions on their numbers, mode of employment, and with provisions for their religious instruction." Stevens' Georgia, p. 312. 2 Hildr. 418.

**1754.** The powers of the Trustees under the charter having been surrendered, or having expired in 1752, a form of government was organized under the Board of Trade. A governor and council were appointed by royal commission. Among the ordinances enacted by them was one that "all offences committed by slaves were to be tried by a single justice without a jury, who was to award execution, and, in capital cases to set a value on the slave, to be paid out of the public treasury." A local assembly was provided. Voters were "to possess fifty acres, but owners of town lots were presently admitted to the same privilege."

**1755.** The first session of the Assembly. An act was

commence from the date of these, &c., the said corporation, assembled for that purpose, shall and may form and prepare laws, statutes and ordinances fit and necessary for and concerning the government of the said colony, and not repugnant to the law and statutes of England, &c.—such laws, &c., to be subject to the Royal approval in privy council; or, rather, that of the "Board of Trade and Plantations," established in 1696, "who succeeded to the authority and oversight hitherto exercised by Plantation committees of the Privy Council." 2 Hildr. 197.

<sup>1</sup> The British government, or the majority of the Trustees, appear not to have been actuated by any moral objection to slavery, in making this prohibition. But Oglethorpe, according to authorities cited by Mr. Bancroft, vol. 3, p. 426, said, "Slavery is against the Gospel as well as the fundamental law of England. We refused, as trustees, to make a law permitting such a horrid crime." Mr. Bancroft also gives the "governmental view," together with the praises which "so humane a plan" excited in England. Neale v. Farmer, 9 Geo. R., p. 575. "The introduction of slaves was prohibited to the colony of Georgia for some years, not from motives of humanity, but for the reason it was encouraged elsewhere, to wit: the interest of the mother country. It was a favorite idea with the "mother country," to make Georgia a protecting barrier for the Carolinas, against the Spanish settlements south of her, and the principal Indian tribes to the west; to do this, a strong settlement of white men was sought to be built up, whose arms and interests would defend her northern plantations. The introduction of slaves was held to be unfavorable to this scheme, and hence its prohibition. During the time of the prohibition, Oglethorpe himself was a slaveholder in Carolina." Stevens, Hist. of Ga. p. 288, says that in the official publications of the Trustees, its inhibition is based only on political and prudential, and not on humane or liberal grounds, and it seems that every negro "found in the place was sold back into Carolina," if not claimed by some owner. Stevens, p. 299, refers for instance, 1730—1741, in Stephens' Journal. See also Impartial Inquiry, &c., London, 1741, in vol. 1, Coll. of Geo. Hist. Soc., pp. 166—173.

passed, "for the regulation and government of slaves." 2 Hildr. 455.

**1765.** *An act for the establishing and regulating Patrols, and for preventing any person from purchasing provisions or any other commodities from, or selling such to any slave, unless such slave shall produce a ticket from his or her owner, manager or employer.*

**1768.** An act to amend and continue the foregoing.

**1770.** *An act for ordering and governing slaves within this province, and for establishing a jurisdiction for the trial of offences committed by such slaves and other persons therein mentioned, and to prevent the inveighling and carrying away slaves from their masters, owners or employers.* This act was a copy of the act of South Carolina of 1740.

The sections are, for the greater part almost literal copies of corresponding sections in the Carolina act.<sup>1</sup> Sec. 14, 15, 16, 17, relate to poisoning by slaves, teaching to poison, and forbid the administering of medicines by slaves. Sec 39, forbids teaching slaves to "read writing," in addition to the injunction of the Carolina act, sec. 45.<sup>2</sup>

<sup>1</sup> Neale v. Farmer, 9 Geo. R. 582, concludes, that, as in S. Carolina, *ante*, p. 306, n. 2, killing a slave is not felony by common law.

<sup>2</sup> The statutes above named are given in Prince's and Cobb's Digests, except as they have been repealed or modified in parts, by later statutes.

## CHAPTER VII.

OF THE PRIVATE INTERNATIONAL LAW EXISTING FOR THE SEVERAL PARTS OF THE BRITISH EMPIRE, DURING THE COLONIAL PERIOD, AND RELATING TO FREEDOM AND BONDAGE—OF THE CONDITIONS UNDER WHICH SUCH A LAW MIGHT EXIST.

§ 231. Public international law being based on the necessity for a rule of action between the possessors of sovereign power, and private international law on the recognition of persons as having been at different times subject to the jurisdiction of different possessors of that power, either of these divisions of international law may come into existence, or be applied, wherever any portion of that power is independently vested or manifested.

While there is little difference of opinion, among writers on public law, as to the abstract nature of that authority which, in their conception, is the characteristic of any one of those political bodies or persons known as sovereign states or independent national polities, there has been much contrariety among them in the recognition of the entirety of that power in the various visible and concrete forms in which political authority or dominion has been manifested.

§ 232. It seems to have been commonly assumed for an axiomatic principle, that sovereignty or supreme national power is always manifested as the prerogative of a unity, as indivisible in its existence ; that, if regarded as made visible in distinctly separate acts of power, those acts, in order to be acts of sovereign power, must ultimately depend upon, or proceed from

one and the same possessor of power ; that the sovereignty which marks or characterizes states is not to be regarded as an aggregation of various distinct and separate powers, each of which may be independently exercised by different political bodies or persons.<sup>1</sup>

It is undoubtedly true that in the international recognition of sovereignty which is made by political bodies, or persons themselves claiming to constitute a state or nation, the only other possessors of sovereign power are persons or bodies each holding, within its own domain, all the powers which can be attributed to a state or nation. For the persons or bodies so recognized must be equal in the nature of their power ; that is, equally sovereign in all respects ; and therefore it is true, that, as regards each other, the manifestation of any single act of sovereign power proceeds from a person or body possessing all other attributes of sovereign power. In view of the international intercourse of nations or states, properly and strictly so called, any person or body, manifesting authority over persons and things, must either possess all the powers of a sovereign state, or be a subordinate person or body, in reference to some one such possessor of sovereignty. It is a basal fact in public law, that states or nations respectively recognize only themselves as the possessors of any portion of sovereign power, and can know themselves, respectively, as the only persons or entities who are absolute and independent of law in the strict and proper sense ; although in certain exceptional cases, states may be known as being in an inferior or limited position in reference to other states, though still being politically distinct : and it may be difficult, in matters of public law, to distinguish clearly between a technical and a virtual sovereignty.<sup>2</sup>

<sup>1</sup> Calhoun's Essay on Gov., 1 Works, p. 146. "There is no difficulty in understanding how powers appertaining to sovereignty may be divided, and *the exercise* of one portion delegated to one set of agents and another portion to another ; or how sovereignty may be vested in one man or in a few, or in many. But how sovereignty itself—the supreme power—can be divided, how the people of the several states can be partly sovereign and partly *not* sovereign, partly supreme and partly *not* supreme, is impossible to conceive. Sovereignty is an entire thing ; to divide it is to destroy it."

<sup>2</sup> Vattel, B. 1, c. 1. Phillimore, International Law, Part 2, c. 2.

§ 233. Whether recognized by external and independent political persons or bodies, or by private persons subject to law proceeding from the exercise of that power, sovereign power is known, not by force of any law in the strict sense, but by the fact of its exercise, by possession. The possession of sovereignty which is recognized as such by other states (externally), must be, as before said, of all sovereign powers, otherwise it will be attributed to some who exercise it only as being themselves subject or dependent persons, or political bodies.

But in the interior or internal manifestation of political power, i. e., its manifestation towards the constituent parts or materials of a state, power over persons and things may be known as sovereign, though divided or held by distribution among distinct persons or bodies, who, in the apprehension of foreign or exterior persons, together constitute only the elements of that unit which they recognize as the possessor of the sum of sovereign power or *the state*.<sup>1</sup> If in point of fact those constituent persons or bodies severally exercise any power independently of any other known political person or persons exercising similar or different powers, that power is, in the public law of the state, a sovereign power in its exercise or manifestation ; though not held by a sovereign in the ordinary acceptation of the word in public international law.<sup>2</sup>

The sovereignty of a state or nation, in order ~~that~~ it may be a sovereign state or nation, is, then, as to the rest of the

<sup>1</sup> Was not this distribution of the powers belonging to a national sovereignty the basis idea of Gothic or Germanic feudalism, which once entered into the constitution of all the modern nations of western Europe ? The feudal chief had an independent sovereign authority for local objects, coexistent with a general subjection of himself and vassals to the king or nation. See Bodin's Rep., as to a sort of sovereignty in certain great families. B. 1 c. 2, (Knolles' Tr. p. 13.) The towns (municipium) first acquired, as corporations, an authority like that of feudal lords. The petty sovereignty of chiefs among the Celtic nations appears to have been more isolated. The Roman political system tended to concentrate all autonomic power in a single hand. Compare Lieber's Civil Liberty and Self-Government.

<sup>2</sup> G. T. Curtis's Hist. of the Origin, &c., of the Const. of the U. S., vol. I., p. 204. "Political sovereignty is capable of partition, according to the character of its subjects, so that," &c. The partition of the powers of sovereignty, referred to in the text, is a different thing from that distribution or separation of the three functions or departments of sovereign power, (the three modes or forms by which it may be manifested, the legislative, judicial, and executive authority,) which is often discussed by publicists, as Bowyer's Univ. Public Law, p. 144, and citations.



world indivisible, or the prerogative of a unity. But the constituents of that state may, relatively to each other, either be an individual or a number of individuals holding, as a political unit, the whole power of a state ; or else an aggregate of individuals or political unities, each holding, independently of the others, separate powers for specified objects and within specified limits of space or of time.

This may certainly be the judicial apprehension of such powers, or their legal character in the jurisprudence of such a state. Whether there must not be in every nation or state some one person, or mass of persons, who potentially hold, or may exercise, if he or they will, every power that can be called sovereign or political power, is a different question ; belonging to the domain of political ethics.<sup>1</sup>

§ 234. Even supposing political power over persons and things to be separately invested in distinct portions or constituents of a nation, under a *law* proceeding from some one supreme national power, the exercise of that power within specified jurisdictions, and over persons as subjects thereto, will give occasion to the existence of an international or *quasi*-international law as regards the exercise and effects of that power.

§ 235. During the connection of the North American colonies with the empire of Great Britain, the sum of the powers of national sovereignty over their territory was distributed, at least according to the views of the colonists, in some undetermined proportion, between the parliament or imperial government, and the local governments of the several colonies.<sup>2</sup> The rules which regulated the public or political intercourse between these various constituent parts of the empire were included in the public municipal law of the empire, a law of political organization, and formed a law in the strict sense of the term, because resting, in theory at least, on the undivided national will, though they resembled public international law in many respects. But since these several parts did, in fact, separately

<sup>1</sup> Domat, Public Law. B. I., tit. 1. Pufendorff, B. 7, c. 4, § 1. Paley, Moral Phil., B. VI., c. 6. Lieber, Civil Lib., &c., vol. 1, 168.

<sup>2</sup> *Ante*, ch. III.

exercise certain political powers within specified jurisdictions, persons might within each be recognized as native or alien, temporary or domiciled subjects, in reference to any one such jurisdiction and its local laws, and persons whether domiciled or alien might be recognized as sustaining relations caused by their previous subjection to another of those jurisdictions.

§ 236. The term *jurisdiction* is used to signify not only the right, power, or authority of promulgating and enforcing law in respect to persons and things within a certain district or territory, but also the territory itself within which that right, power or authority is exercised. And the term is also frequently used in a sense including both these meanings; as where persons are denominated aliens in respect to a certain *jurisdiction*; meaning not only to the territory, but also to the laws prevailing therein, and the political power from which they proceed.

It has been shown in the first chapter, that when private international law becomes distinguished from the municipal (internal) law in any jurisdiction, it is by its *application to persons*; and that it is based upon the recognition of certain districts of territory, as being under separate political power, constituting separate jurisdictions, and of persons as being alien or native in respect to one or the other of those jurisdictions; or, rather, upon the recognition of persons in one such jurisdiction as having rights or sustaining obligations in relations arising from a previous subjection to the law of another; and that it has always, by its application, the character of a personal law.<sup>1</sup>

§ 237. A simple subjection at different times to different jurisdictions being thus the foundation of private international law, the legal relations of even the domiciled inhabitants of one jurisdiction may sometimes be therein taken to be affected by a temporary subjection, without domicil,<sup>2</sup> to the laws of another; as

<sup>1</sup> *Ante*, § 53.

<sup>2</sup> According to what has been said before (§§ 54, 121,) the circumstance of natural or native birth, or the congenital circumstance of a legal naturalization, is that upon which the distinction of alienage is primarily founded. But, in the practice of nations, distinguishing between persons in respect to the laws which control their condition, it is the fact or facts constituting the technical relation of *domicil* rather than the natural fact or circumstance of birth, or an equivalent naturalization, which, in most instances, distinguishes the alien from other persons in the national jurisdiction,

ations arising out of contract. Thus also a loss of personal property, for crime committed against the state to which the person has been temporarily subject, may, in certain cases, be recognized in the domicil of such person. This instance of international law, though affecting the individual right herein particularly considered, i. e., personal liberty, is however distinct from the international recognition of *status* or condition, which, according to previous definition, consists in the possession or non-possession of individual rights, with capacity for relative rights in relations towards other private persons. The persons whose condition under private international law is here to be required into, were, in the first instance, to be recognized

aliens to some one jurisdiction, by reason of previous domicil in another; and the question to be considered is of the subsequent continuation or alteration of their rights and obligations, created under the law of such domicil, in those relations which constitute *status* or condition.

§ 238. Although each colony of the British Empire was a part of the integral imperial or national domain, and under one imperial or national jurisdiction, yet, in being also under a distinct local government, it constituted, in respect to it, a particular local jurisdiction. Persons in the several colonies might be distinguished as being either alien, temporary, native or naturalized, or domiciled subjects, in reference to one only, or to both of these jurisdictions, and to the two several sources of law and jurisdiction, thus having concurrent existence in each colony. And in this view, England, Scotland and Ireland might each, before the legislative union,<sup>1</sup> be considered as being in the same manner under a local and a national jurisdiction, and persons in any one of those portions of the original dominion of the British Empire might be distinguished as native or alien, temporary or domiciled subjects, in respect to one or both of the sources of law therein.

which they are all equally subject. In other words, the distinction between domiciled subjects and subjects having a foreign domicil is more comprehensive, in private international law, than that between native or naturalized and alien born subjects, which last is more important in that part of international law which is herein called *public*, concerning the rights and obligations of states to each other as distinct nationalities.

<sup>1</sup> Acts of Union, for England and Scotland, 5 & 6 Anne, c. 8, (1706,) for England and Ireland, 39 & 40, Geo. 3, c. 67, (1800.)

Those persons who were alien, either by birth or by domicil, to the national jurisdiction of the empire, were necessarily such also in reference to any one particular jurisdiction. But since the domicil of any person, subject, by birth or by domicil, to the national jurisdiction, would also be a domicil with reference to one only of those particular jurisdictions into which the empire was divided, any English subject, by having a domicil in one of those jurisdictions, would, when within the territory of another, be alien in respect to it and its local law ; though remaining under the same national sovereignty and under the jurisdiction of the same national law.

§ 239. Whatever rules may be applied as private international law in any jurisdiction to determine the rights or relations of alien persons, must depend upon the will of the political source of the municipal (national) law therein ; since no rules of action can have the force of law within any territory except by the will of the supreme power.<sup>1</sup>

The *status* or condition of aliens in any one of the several particular jurisdictions of the empire, whether aliens to the whole empire or to that particular jurisdiction only, would be determined by one or the other of those sources of the municipal law which prevailed therein ; viz., either the national or the local authority.

To ascertain then the law applying in any one locality of the empire to the condition of an alien of either of the above described classes, it is necessary,

*First*, to refer to the public law, or law of political constitution, to ascertain the location of the supreme legislative or judicial power over such persons and over their various relations, (i. e., the investiture of that power, either in the local or in the imperial legislature,) and

*Secondly*, to ascertain the actual rule of action proceeding from such power.

§ 240. It has already been necessary, in giving an historical exposition of the origin of the municipal (national) law in

<sup>1</sup> *Ante*, §§ 12, 36.

America, both public and private, to indicate the several political sources of power from which the laws affecting the condition of alien persons of each of these classes in the several divisions of the empire might proceed ; and also to state some of the rules or principles actually applied to determine the condition of such persons, whether aliens to the empire or to any one of the several particular jurisdictions.<sup>1</sup> For although those rules were there described as taking effect in the American colonies with the force and extent of municipal (internal) law, they yet had, from the first, an international effect, from the national character and political associations of the persons to whom they were applied and for whom they received a personal extent,—the character of personal laws.

It has been shown that, so far as the condition of persons *alien to the empire* consisted in such rights of persons as were incident to relations of external commerce and intercourse with foreign nations, it was determined by the authority held by the imperial, rather than by that held by the several provincial governments ;<sup>2</sup> while such was the distribution of power in the colonies, between the local and the imperial governments, that the condition or relations of the domiciled inhabitant of any particular jurisdiction were determined, partly by a law emanating from a local authority, and partly by a national law ; the latter having, in reference to such inhabitant, the same force and effect in every other jurisdiction of the empire ; determining, within each, the condition of such person, so domiciled in another jurisdiction of the same empire, in all relations falling within the scope of that national law while such person was in the place of his domicil.<sup>3</sup>

§ 241. It has also been shown that with the first establishment of law in the colonies, (whether proceeding from the imperial or the local source of law,) and with the first necessary recognition of persons as aliens, (either to the territorial dominion of the empire, or to the territory of England, and the law

<sup>1</sup> *Ante*, Chapter V. VI.

<sup>2</sup> *Ante*, § 203.

<sup>3</sup> *Ante*, §§ 136, 137, 193.

having territorial extent therein,) a personal distinction existed in the application of the national and of the particular laws; according to which both the domiciled inhabitants of the several colonies and persons known as aliens, to the colonies and to the rest of the empire, became distinguished into two classes, standing in different relations towards the imperial and the colonial authority. This distinction was founded upon a difference of race, complexion, or physical structure, and, in some degree, upon differences of religious belief; and this distinction, in having been first judicially applied among persons known as *aliens to the imperial dominion*, or to the laws of England, was applied as private international law, both under the imperial and the local authority, and having been continued in the municipal (internal) law of the colonies, applying to the domiciled inhabitants of those colonies, it continued to distinguish them when appearing as *aliens to the jurisdiction of any one particular colony or division* of the empire.

§ 242. For the alien (to the empire) of white or European race, in being a native or domiciled subject of some Christian nationality, or of such a state as was a recognized participant in the jurisdiction of public international law, was regarded as being under the protection of that law which is an acknowledged rule of action among civilized nations, though not having the force of law, in the strict sense of the word, as a rule of which nations are the subjects: and whatever rights attached to such alien under such law were, so long as he continued in alienage, regarded as being under the protection of the imperial or national power, as well as under that of any particular jurisdiction within whose territorial limits he might be found;—since all relations constituting the national intercourse with foreign states were, of necessity, controlled by the imperial rather than by the provincial authority. And when such alien of European race had become a domiciled inhabitant of any one political division of the empire, his condition, and that of his posterity, was under the charters, and the various laws of naturalization,<sup>1</sup> deter-

<sup>1</sup> *Ante*, 202.

nined like that of the inhabitant of English birth or descent, by a law resting in part on the national authority ; which, to that extent, continued to be a law of his condition when appearing in any other jurisdiction of the Empire than that of which he became a domiciled inhabitant.

§ 243. On the other hand, aliens to the empire of African or Indian race, if not every alien of a barbarian or heathen race, were without the protection given by public international law to foreigners of European birth, and did not, as aliens, sustain relations known to that law and incident to foreign commerce and political intercourse falling within the scope of the national imperial authority ;<sup>1</sup> unless indeed the rights of a foreign owner in respect to a slave of one of those races might receive protection from the national authority, as forming an incident of the relations of such alien owners. So far as the slave trade was foreign commerce, or consisted only in the importation of chattel slaves from abroad, it would seem to have fallen within the legislative province of the imperial Government, rather than in that of the several colonial authorities. So far as such African or Indian alien was recognized as a legal person, his condition was determined entirely by the local authority of that particular jurisdiction of the empire in which he might be found. And, whether chattel slavery is to be taken to have been supported by a law proceeding from the national authority, at the time of its introduction into America, or not, yet,

<sup>1</sup> By Mr. Justice Daniel, in *Dred Scott v. Sandford*, 19 Howard, p. 475 ; " Now the following are truths which a knowledge of the history of the world, and particularly of that of our own country, compels us to know—that the African negro race never have been acknowledged as belonging to the family of nations ; that as amongst them there never has been known or recognized by the inhabitants of other countries anything partaking of the character of nationality, or civil or political polity ; that this race has been by all the nations of Europe regarded as subjects of capture or purchase ; as subjects of commerce or traffic ; and that the introduction of that race into every section of this country was not as members of civil or political society, but as slaves, as *property* in the strictest sense of the term."

There is no connection between the political nonentity of African communities and the status of Africans when they appear in foreign countries. The fact that negroes did not enter this country as the subjects or members of some recognized foreign state or nation is, in the section above, noticed only as indicating the source of law, imperial and national, or colonial and local, upon which their condition depended. The act did not determine their condition as bond or free. An African savage entering a European jurisdiction as a voluntary immigrant would, *jure gentium*, have been as free of condition as any immigrant of European race.



as has been shown in the preceding chapters, the power of limiting, in the first instance, and, finally, of prohibiting the importation of chattel slaves from abroad was claimed by the several colonial legislatures, each for its own jurisdiction. The power to regulate the introduction by land, or from the other colonies, of Africans and Indians held in servitude appears to have always been left to their discretion, without controversy.

§ 244. The condition of the African or Indian, when once settled within a colonial jurisdiction, either by becoming a free domiciled inhabitant, or the property of a resident, appears to have always been exclusively within the prerogative of the local sovereignty. It would seem, from the personal distinction which constantly obtained in the application of municipal (internal) laws in the American colonies, that there was no law, affecting the condition of the African or Indian domiciled subject, having like national foundation and extent with the common law, applied to the white colonist. For while the legal condition of the African or Indian inhabitant, in any particular jurisdiction, might vary therein, from chattel slavery—the negation of all legal rights—to the possession of all individual and relative rights of a private person known to the common law of England, that condition rested, apparently, only on the local law of that jurisdiction, and was not supported therein by a law of the national power, having national extent and recognition as a law of the national or imperial jurisdiction. And it has been shown that even the terms of those royal charters which guaranteed to the *colonists*, generally, and their descendants, the rights of subjects of English birth, must be interpreted with reference to this limitation existing in the *law of nations*, or universal jurisprudence, then received as an authoritative exposition of natural reason and applied in municipal and international law,<sup>1</sup> and that therefore the condition of Indians and negroes, born within the colonial jurisdictions, was not determined by that personal law of privilege, derived from the common law of England, which had, for whites or European subjects, a national extent. What

ever support the condition of the African or Indian might have in the sovereignty held by the imperial government, while considered an alien to the British empire,—when he became a domiciled subject, his relations and rights were determined only by the law of the particular district in which he might be found ;—by the municipal (internal) law thereof, if therein domiciled, and by the international law *as received and applied in that jurisdiction by the local sovereignty*, if domiciled in some other part of the empire : each particular jurisdiction being, in respect to aliens of these races, independent in its interpretation of private international law ; except so far as that law concerned relations of *foreign* commerce and intercourse. And there was no law, resting on the national authority and having national extent, by which, as a personal law, the condition of such persons domiciled in some one particular jurisdiction could be determined throughout the empire, independently of the local authority of each several jurisdiction ; not even if, while being such alien in respect to such several jurisdiction, he were claimed by other persons as an object of property. Because, as before shown, it was only in the relations of *foreign* commerce that that condition received any support from the imperial power. If claimed as property of a master, domiciled in some other division of the empire, who by the law having national extent enjoyed the individual or absolute right of private property, still his property in the African or Indian slave would not rest upon such national law, unless the common law of England could be taken, at the time, to admit that kind of property or to include the doctrines of the historical *law of nations* (*jus gentium*) as known at the first introduction of slaves into America.<sup>1</sup>

§ 245. It has been shown in the fourth chapter, that—if at any period the doctrines of the historical *law of nations*, in respect to chattel slavery, had had force in England itself, as part of the common law, either those principles were applied to heathen negroes or Indians only while alien, and before becoming Christianized, and, on becoming domiciled inhabitants and

<sup>1</sup> Compare *ante*, § 138.

baptized, their legal condition became determined by some law originating in the local juridical power, some *jus proprium* ; or else, that the *law of nations* must itself be taken to have changed in the judicial recognition of English courts, during the colonial period ; and, that in England, towards the close of that period, the law which had attributed the possession of individual rights and a capacity for relative rights to all persons of the white or European race, irrespectively of their national domicil, was taken to extend to all natural persons of whatever race. The question of the recognition or non-recognition, in England, of such a doctrine, in the application of private international law, is to be considered in the next two chapters. It will here be assumed that the historical facts stated in the fourth chapter, the course of colonial legislation which has been shown in the sixth, together with the judicial authorities which will be set forth in the next chapter, indicate that such a change in the *law of nations* did take place at some period prior to the American Revolution ;<sup>1</sup> and that, whenever it may have occurred, it must be taken to have modified the common law of England in its *national extent* throughout the empire. So that, regarded as the personal law supporting the liberties or privileges of the master, it did not, or at least at a point of time shortly before the Revolution, did not support in any one part of the empire the slavery of any Indian or African domiciled in another part : not even if it is to be admitted that, while the African slave trade continued to be sanctioned by the British government, the title to right of ownership in heathen Africans, when imported by the traders, rested on common law, or the "law merchant."

§ 246. So, on the other hand, although the condition of a person of the African or Indian race, domiciled in any one jurisdiction of the Empire, might, under the local law of that jurisdiction, consist in rights of the same legal nature as those which characterized the condition of an inhabitant of the same

<sup>1</sup> This assumption is made *here*, it is to be observed, in describing the character or authority (as being either national or local) of the law upon which the question of the continuance of the relation of master and slave beyond the place of their domicil would depend. The further proof can only be given by an analysis of the judicial decisions here referred to.

jurisdiction who was of English or European race, those rights were the result of a law confined in its territorial extent to the jurisdiction, and not of a law having national extent, and therefore their support in any other part of the empire would depend upon the private international law, as received and applied therein by the local source of power.

§ 247. If the bondage of indentured white servants or the redemptioners, was a relation which could not exist in England itself, and was created by a law having special reference to the colonies, as parts of the empire in which it was to be maintained, it was still a condition which originated under the imperial or national source of law. At least the law under which such persons were sent out in bondage, from England to America, must be taken to have had national jurisdiction to that extent. And it appears to have been recognized as such by the reception of those persons into all the various colonies, under the obligations originally created in the mother country. But, from the power assumed by the several colonial legislatures over the condition of this class of persons, when once incorporated into the resident population of any colony, the particular rights and obligations attending their servile condition and the period of their continuance in servitude, seem to have rested in each colony upon the local law alone. If the bondage of this class of persons, when domiciled in the colonies, did thus lose the support of statutes resting on the imperial authority, and if also the right of the master to the services of such bondsman was not supported by the common law having national extent, the international recognition of this condition in such persons, when found in any other jurisdiction of the empire than that in which they were domiciled, would depend only upon the will of the local authority in that particular jurisdiction, and the view held by it of the true doctrine of private international law (that is, what rules *ought* to be applied as private international law,) relative to such a condition of private persons. The only law to determine the condition of this class of aliens in the several parts of the empire, at least when they were recognized as having a domicil in some other one of the colonies, would therefore be such as in its

*authority* would be identified with the local municipal law thereof, and be derived from the local power ; though it would be international law from the alien character of the persons to whom it should be applied ; a law having the same character as that by which the condition of the African or Indian, domiciled in some one colony, would be determined in any other particular jurisdiction of the empire in which he might be found, i. e. municipal and local law in its *authority* ; international by its *application* to those persons thus regarded as alien in respect to that jurisdiction.

§ 248. The law therefore which applied in any one of the several jurisdictions of the British empire, as private international law to these two descriptions of persons, viz. : indentured white servants and Africans or Indians having a domicil in some other one of the colonies must be ascertained in the same manner as if those jurisdictions severally constituted independent national jurisdictions, in all respects.

§ 249. There existed also, in the several jurisdictions of the British Empire, another class of persons who by law were obliged to render service to private masters, viz. : minor apprentices ; and in case of the removal of such apprentices from the place of their domicil, or in case of their absconding and being found in some jurisdiction other than that in which their obligations first existed, the question of the continuation of the rights and obligations of the parties to the relation would resemble those which in the case of slaves and indentured servants in like circumstances, would be decided by private international law, as above distinguished from the common law having national extent.

But, though the condition of a minor apprentice was created by indenture, and was similar in its temporal limitation and some other incidents to that of the so-called redemptioners, it had a totally different foundation. The relation of master and apprentice was a continuation of, or substitute for, that of parent and child, or that of guardian and ward. The power of the master was a delegation of the *patria potestas*, and with the right to service was associated a personal duty in respect to the apprentice, which was not recognized in the case of the in-

dentured or purchased bond-servant. Though generally modified by statute law, the relation was one defined and recognized by the common law of England : and while it had a local character, in being intended to exist only in certain districts, such as counties or towns, and under the supervision of the civil authorities therein, so that it could not be said to continue between the parties if permanently removing from the jurisdiction in which it had been created, yet, as between parties domiciled elsewhere, the right of a master to control the person of the fugitive apprentice may have been recognized in the several colonies as a right at common law, that is, the common law of England having personal extent.

## CHAPTER VIII.

OF THE PRIVATE INTERNATIONAL LAW OF THE COLONIAL PERIOD  
AFFECTING CONDITIONS OF FREEDOM AND BONDAGE.—THE SUB-  
JECT CONTINUED.—OF ITS ACTUAL EFFECT OR OPERATION.

§ 250. In the preceding chapter the conditions, created by the public municipal law, have been indicated under which a private international law, affecting freedom and bondage, might exist in the colonies. It is now necessary to ascertain its actual operation or effect.

It has been shown, in the second chapter, that the private international law, like every other rule which has the force of law for private persons, is known or promulgated either from a judicial or a legislative source ; being, in either case, equally *positive* law, in the sense of the ascertained will of the state, though, in ordinary parlance, the term “positive law” is applied only to law known by legislative enactment ; positive legislation being more authoritative than law judicially ascertained, only in this, that it is a more direct method of ascertaining the will of the supreme source of law on any particular topic ; but, in the natural order of existence, the law judicially ascertained precedes positive legislation, and always exists as of necessity.<sup>1</sup>

The condition, in respect to freedom or bondage of persons of the classes before described, having a domicil in one of the colonies, when appearing as aliens within another jurisdiction of the empire, might have been determined either by legislation,

<sup>1</sup> *Ante*, §§ 17, 29.



giving direct international reference to such persons, or by the judicial application of general principles of international jurisprudence. This judicial source of law, for the reason just stated, *z.*, its naturally prior existence, should, in the historical order, be first examined.

§ 251. It has, however, been convenient to present, in the preceding chapter, the legislation of the several colonies having this extent among the statutes which operated as municipal (internal) law. It consisted principally in statutes limiting the importation of negro and Indian slaves and servants. With the exception of the eighth article of the agreement between the New England colonies, in 1643, and the seventh in that of 1672,<sup>1</sup> so far as they took effect as private laws. No laws appear to have been enacted respecting slaves or servants escaped from other jurisdictions, or brought in by their owners without the intention either to sell them or to acquire a domicile.

It would have been consistent with the view herein before taken of the foundation and extent of two systems of personal laws, obtaining in the colonial districts of the empire, if acts had been passed by colonial governments prohibiting or regulating the entry of free persons of African or Indian race domiciled in other colonies. There does not, however, appear to have been any such exercise of the legislative power. In the earlier history of the colonies, there were some instances of local legislation prohibiting the ingress, or compelling the departure of persons equally entitled, with the other inhabitants constituting the legislating majority, to the enjoyment of individual and relative rights under the law of England. Such legislation, in most of these cases, was caused by the ideas, then generally prevalent, respecting the duty of a political state in relation to the religious instruction of the subject, which, soon after the extension of the English dominion over the whole Atlantic seaboard, and the manifestation of a very great variety in religious belief among the inhabitants of all the colonies, became essentially modified. And, whether the colonial governments con-

<sup>1</sup> *Ante*, pp. 268, 269.

ceived such legislation beyond their powers or not, those laws were repealed, or fell into neglect.

§ 252. There are, probably, no extant records of judicial determinations, by the colonial courts, of questions relating to status or condition, having the international or *quasi-international* character, which was before indicated. If the eighth article of the agreement between the New England colonies, in 1643, and the seventh, in that of 1672,<sup>1</sup> may be presumed to have been supplemental to the unwritten law, it might be argued from their existence, that the courts in those colonies could not, without them, have maintained the master's claim, *in pais*, over the persons designated by the term *servants*. But it is, perhaps, equally just to infer that the object of the compact was, not so much to give a legal existence to the right of the alien owner, as to facilitate its peaceable establishment by giving the local authorities power to adjudicate on a claim or demand to be made by him before them, in the first instance ; and, after the judicial establishment of the right, to maintain, in his behalf, the custody of the slave or servant while within the limits of the forum, or, it may be said, to *deliver up* the slave or servant to the master, when he could repass the territorial limits of the forum.<sup>1</sup>

§ 253. As to indentured servants, it is not unlikely that a variety of practice obtained in the different colonies as to the international recognition of their relations towards the persons claiming their services under the law of another jurisdiction. From the order sent out from England, in 1633,<sup>2</sup> the Virginian order in reference to Dromond's servant,<sup>3</sup> and the clauses just referred to in the New England Articles, it may be inferred that the judicial tribunals did not, generally, consider it their pro-

<sup>1</sup> It is to be noticed that even if the relation between the alien owner and servant or slave was, in any colony, supported by the unwritten *private* international law, yet the owner could not, by it alone, make any *claim* upon the public authority for the *delivery* of such servant or slave. He would have the right to seize the body of such servant or slave, (making a claim *in pais*,) but then his right could be determined upon and a delivery be made to him only in some action brought in behalf of the alleged servant or slave. Under the compact only could there be a *delivery on claim*.

<sup>2</sup> *Ante*, p. 229, note 1

<sup>3</sup> *Ante*, p. 281.

to enforce the obligations of such persons, in the absence of legislative enactment.<sup>1</sup>

As has been already observed, the relation of minor apprentices to their masters may have been at the same time judicially recognized, in case of the claim of an alien master to a fugitive apprentice, under the national law having a personal extent to subjects of English race. But it is highly probable that the principles in the New England compacts were practically applied to this class of persons, as well as to others bound to a service for years.

§ 254. It is also highly probable that, under the New England compacts, the term "servants" was taken to include negroes. But, whatever inference might be drawn from this for and against the validity of the master's right under the unwritten national law, there can be little doubt that, in all the colonies, slavery continued to be judicially supported in the case of slaves introduced from other jurisdictions, except so far as such introduction may have been limited by legislative enactment; and this, whether such slaves were brought in to be permanent residents or were only sojourners, either accompanying non-resident owner or being fugitives. And this, it may be supposed, was the case even in those colonies, if any such there were, where the local slavery may have been considered the condition of a legal person, as contrasted with chattel slavery.<sup>2</sup> Even in Massachusetts, if there was a time, prior to the Revolution, when no domiciled negro could have been held there as a slave, it is probable that the relation between owners and slaves, domiciled elsewhere, would have been judicially maintained.

§ 255. Of all the cases decided in the English courts, which are cited in the fourth chapter,<sup>1</sup> that of the negro, Somerset,

But since, in the earlier period of the colonial history, persons were occasionally sent from some one of the colonies under a sentence to be sold as servants in another colony, it was evidently presupposed that such sentence would be recognized in the latter.

It may be inferred that this was the case, because the contrary has never been established in the cases which have occurred since that period.

Among these might have been noted, next to *Butts vs. Penny*, Sir Thomas Ham's case, (1686,) as given in 3 Mod. R. 120; "He bought a monster in the

is the only one in which the question of freedom and slavery appears as one to be decided by private international law. The circumstances of that case have been already stated in the opinion delivered by Mansfield. The master and slave were recognized to be the domiciled inhabitants of a colony, the master having done no act by which he acquired a domicile in England, and the power of the negro to acquire it *sepe animo manendi*, by having the intention to do so, may have depended on an anterior question, whether he was or was not a free person.<sup>1</sup>

§ 256. Two Scotch cases are cited in the notes to the case of *Somerset*, in 20 Howell's St. Tr., from Moore's Dict. of Decisions, vol. xxxiii, tit. *Slave*. The first, *Ex parte Sheddan against* a negro, was in 1757. The owner proposed to carry the slave back to Virginia and brought his claim before the courts, when the latter refused to go. The negro was not before any decision could be rendered. The other case, *Ex parte Joseph Knight, a negro, against John Wedderburne*, was in 1775–1778. The negro had been in Scotland several years, had married there, still rendering services, but after claiming to be free. On pleading, the master claimed a right either to perpetual service, in Scotland, or to send him back to the colonies—Jamaica.

The case being heard before the sheriff, he found "that the state of slavery is not recognized by the laws of this kin-

*Indies*, which was a man of that country, who had the perfect shape of a chimney coming out of his breast as an excrescency, all but the head. This man he brought and exposed to the sight of the people for profit. The Indian turned Christian, was baptized, and was detained from his master. The master brought a *hominem replegiando*. The sheriff returned that he had replevied the body, but did not say in which *Sir Thomas* claimed a property, whereupon he was ordered to answer on his turn. And then the Court of Common Pleas bailed him." The marginal note says: "*Homine replegiando lies for a baptized infidel detained from his master.*"

"But it does not appear that the return was ever argued, or that there was any opinion in this case, and, therefore, nothing can be inferred from it."—Bentley's note, 20 Howell's St. Tr. 55.

<sup>1</sup> See *ante*, note at the foot of page 109.

<sup>2</sup> The 15 Geo. 8, cap. 28, (1775,) is an act for altering, explaining, and amending several acts of the parliament of Scotland, respecting colliers, coal-bearers, and saltworkers, and recites, "Whereas by the statute law of Scotland, as explained by the judges of the courts of law there, many colliers, &c., are in a state of slavery or bondage, the collieries and saltworks where they work, for life, transferable with the persons, and saltworks, when the original masters have no farther use for them; and

It repelled the defender's claim to a perpetual service." On being heard before the Lords of Session, the court "were of opinion that the dominion assumed over this negro, under the act of Jamaica, being unjust, could not be supported in this country to any extent; that, therefore, the defender had no right to the negro's service for any space of time, nor to send him out of the country against his consent; that the negro was likewise protected under the act of 1701, c. 6, (the act for preventing dangerous imprisonment, and against undue delays in trials,) from being sent out of the country against his own consent. The judgments of the sheriff were approved of," &c.<sup>1</sup>

§ 257. Cases of this kind occurring in the British islands during the colonial period will have a peculiar value in indicating the relative extent of the various personal laws prevailing in the British Empire, and how far the rights and obligations are dependent to the personal condition or status of private persons as sustained by them, independently of the territorial limits of the local jurisdiction.<sup>2</sup> But so far as the several jurisdictions of the empire, in determining the personal condition of private persons were, towards each other, in the relation of distinct independent nationalities, these decisions will have had in the colonies, only the force of foreign judicial decisions.

§ 258. The so-called rule of comity, regulating, in the forum jurisdiction, the international operation of foreign laws,<sup>3</sup> has been described as being always operative, except where limited by local statute or usage.<sup>4</sup> It may be thought then that, if

persons are discouraged and prevented from learning the art or business of colliers, by their becoming bound to the collieries and saltworks for life, where they shall be for the space of one year, &c." From which language it would appear that the statute arose from judicial constructions of the first contract. This statute was not sufficient to free these people, another being passed in 1799. See also, 1 Barrington Stat. 1 Rich. 2, note 9, in 3d ed., and the argument in *Knight agst. Wedderburne*, which is given in 20 Howell's State Tr., in notes to *Somerset's case*.

<sup>1</sup> 1 Burge's Comm. on Col. and For. Law, p. 741. Boswell, who was in Edinburgh at the time of the argument, 1777, says in his *Life of Johnson*, "a great majority of the Lords of Session decided for the negro. But four of their number, the President, Lord Elliock, Lord Monboddo, and Lord Covington resolutely maintained the lawfulness of a *status*, which has been acknowledged in all ages and countries, that, when freedom flourished, as in old Greece and Rome." And on a preceding page he has given an argument, dictated by Dr. Johnson, in favor of the negro's freedom, together with some observations of his own maintaining the other side.

<sup>2</sup> *Ante*, § 243.

<sup>3</sup> *Ante*, § 88.

<sup>4</sup> *Ante*, § 122.

valid at all, this rule should be sufficient in itself, and exclude any rule, otherwise derived, for determining in the forum the international allowance of the effects of foreign laws; and the any reference to foreign precedents for this purpose is either superfluous or inconsistent with the rule. This may be true, and the proper doctrine seems to be that, unless the foreign precedents have been adopted into the local customary law by some previous judicial action, the so-called rule of comity may not control the action of the tribunal. But since the judicial application of this rule involves inquiry into the personal extent of the local law, as being either limited or universal, and through this the judicial recognition of a universal jurisprudence or *law of nations* forming part of the law of the forum,<sup>1</sup> a reference to foreign precedents is generally indispensable in the practical application of the rule of comity, where local usage or statute is wanting: and hence in every forum or jurisdiction a private international law is formed which may be juristically spoken of as existing in or among all civilized states, or, as a body of rules which, being known from the customary juridical action of many states,<sup>2</sup> obtains judicial recognition in any supposed forum of jurisdiction.<sup>3</sup> There is, at least, a constantly increasing presumption that the private international law of any forum corresponds with the rules received contemporaneously in other countries in like cases.

For this reason the judicial decisions of European courts during the colonial period, in cases concerning the international recognition of personal condition or status and the relation of master and slave, and the general rules received by them in such cases, according to the testimony of approved jurists, may, with the English cases, be referred to as illustrations of a private international law<sup>4</sup> taking effect in and between the several

<sup>1</sup> *Ante*, §§ 89-101.

<sup>2</sup> *Ante*, §§ 86, 76.

<sup>3</sup> As such it is spoken of as existing independently of the will of some one particular state, (Curtis, J., in 19 Howard R. 594, 595,) and becomes the special subject of treatises like Story's Conflict of Laws, Fœlix's Droit International Privé, and the fourth volume of Mr. Phillimore's elaborate treatise on International Law.

<sup>4</sup> International law is here supposed to have *customary* existence, proved or illustrated by foreign juridical authority, usually judicial and juristical. Foreign law

isdictions of the empire, so far as they were in similar circumstances.

The proper force of these precedents under an application of the rule of comity in any particular jurisdiction of the empire, and as being evidence of rules receivable for universal jurisprudence or the *law of nations*, will be separately examined.

§ 259. There are not many judicial decisions on record which can be referred to as having had this kind of authority during the colonial period. Burge, in *Commentaries on Colonial and Foreign Law*, vol. I., p. 739, cites from Christinæus, *dis. tom. iv., decis. 80, n. 4*, a case in which the supreme council of Mechlin, in 1531, refused to issue a warrant to take a person who had escaped from Spain, where he had been caught and legally held in slavery. The reason given for the decision is—"propter libertatis personarum usum hic per aliquot annos continue observatum." The same case seems to have been noticed in Zypæ, *Not. Belg.*, l. 6, p. 180.

Groenewegen, *De Legibus Abrogatis et Inusitatis* (1649), l. 1, tit. 8, is another authority as to the law of the Netherlands on this point. "Quamvis servos habere Christianis nefas sit, si modo herili in servos potestate non abutantur, sed secundum Christianam lenitatem et mansuetudinem tractent. *Epist. ad Phil. Ephes. 6 vers. 5, cum seqq. Colos. 3, Tit. 29. 1 Petr. 2, 18. 1 Corinth. 7, 20. 1 Timoth. 6, 1. Seneca de Repub. 3, sect. 4 & 7, & Pol. l. i. c. 4.* Servitutem non adeo exhorruere majores nostri ut uno ferme libertatis nomine, utque fama Græcis juxta ac Latinis monumentis maxime celebrati sunt Germani, teste *Philippo Culverio, Germ. Antiq. l. I. c. 38, in princ.*, atque hinc servitus paulatim ab usu cessit, ejus nomen hodie apud nos exolevit; adeo quidem ut vi, qui aliunde huc adducuntur, simul ac imperii nostri fines transierunt, invitis ipsorum dominis ad libertatem proclamare possint; id quod et aliorum Christianorum gentium moribus rectum est, vide *Costum. van Antwerp. tit. 38, art. 1, 2. Grot. Induct. l. 1, part 4, § 2. Gudelin de jure noviss. l. 1, c. 4. Perez,*

also may be declaratory of this customary law, but there is a presumption that it is intended to be alterative or supplementary to some supposed deficiency.



*c. de nudo jur. Quirit., n. 3. Zypæ, notit. jur., l. 6, tit. 1. Christin. vol. 4, decis. 80, n. 2, et seqq. Papon, notair. 3, l. 1. de lettr. d' affranchi, princ. Charond. Pandect. du droit françois l. 2, c. 2, sect. mergin. droict de suite ou poursuite. Autant confer de his qui ad eccles. Mornac, in l. 19. Denique D. de quibus caus. major. Boer, ad cons. Bitur. tit. 1, § 1. Aliqua quæ dixi C. de Agricol."*

§ 260. An occurrence related by Wicquefort,<sup>1</sup> is sometimes cited as a recognition of the same doctrine by Poland during the period of her independent existence.<sup>2</sup> It in fact only shows that the estates of Holland, i. e., the government, were willing, in favor of a powerful nation, to construe the law of nations to the prejudice of a weaker, and in derogation of the rights of persons under private law, as explained by their own jurists. A certain Pole left his own country and went into Muscovy, where he attached himself to the suite of an ambassador who was to proceed to Holland. It does not appear that in Muscovy he had sold himself as a slave, or lost the status of a freeman.<sup>3</sup> Wicquefort says,—“s'estoit retirée en Moscovie et s'estoit mis à la suite de deux Ambassadeurs que le Czaar envoyoit en Hollande; mais son dessein estoit de ne retourner point dans un pais, où tout le monde est esclave. Il se deroba de la suite des Ambassadeurs et se retira chez le Resident de Pologne; qui, craignant ce qui lui arriva depuis, le fit evader. Les Muscovites en firent tant de bruit, que les Etats de Hollande, après avoir fait occuper toutes les avenues de la maison, y firent entrer quelques officiers et soldats pour faire la recherche du fugitif. Ils n'y trouvèrent personne, et cependant ils firent cet affront au ministre public du roy de Pologne.” The Polish Ambassador may be supposed to have held that a slave became free either by being in Holland or by being within the house of the representative of his native country. But the question here, apparently, was one of allegiance, not of personal status.

§ 261. Wicquefort in commenting on this, thus declares

<sup>1</sup> Ambassadeur et ses Functions, par M. de Wicquefort, vol. I., p. 418.

<sup>2</sup> 1 Phillimore, p. 842.

<sup>3</sup> As the case is cited by some writers, e. g. Phillimore, l. c.

the French law in such cases : "Le Polonois n'estoit point esclave né du Czaar ; et s'il l'estoit devenu en allant demeurer en Moscovie, il recouvra sa liberté naturelle en mettant le pié dans un país qui ne nourrit point d'esclaves, et où on ne devoit point scavoir ce que c'est que de servitude ou d'esclavage. Les Jurisconsultes Francois disent, que l'air de France est si bon et si bénin, que dès qu'un esclave entre dans le Roiaume, mesme à la suite d'un ambassadeur, il ne respire que liberté et la recouvre aussi-tost."

Bodin, in his Republic, book 1, c. 5, appears to be the oldest French authority. (Knolles' transl. London, 1606, p. 42.) "But in France, although there be some remembrance of old servitude, yet it is not lawful there to make any slave, or to buy any of others : insomuch that the slaves of strangers, so soon as they set their foot within France become frank and free ; as was by an old decree of the court of Paris determined against an ambassador of Spain, who had brought a slave with him into France.' And I remember that of late a Geneva merchant having brought with him unto Thoulouze a slave whom he had bought in Spain, the host of the house, understanding the matter, persuaded the slave to appeal unto his liberty. The matter being brought before the magistrates, the merchant was called for : the Attorney General, out of the records, showed certain ancient privileges given (as is said) unto them of Thoulouze by Theodosius the Great, wherein he had granted, that slaves so soon as they come into Thoulouze should be free. The merchant alledging for himself that he had truly bought his slave in Spain, and so was afterward come to Thoulouze, from

<sup>1</sup> Bynkershoek, *Du Juge Competent des Ambassadeurs*, (translated into French by Barbeyrac, and published in his edition of Wicquefort's *Ambassador*,) ch. 15, § 8, refers to Albericus Gentilis, *De Jure Belli*, Lib. II, and this passage in Bodin, for this case of setting free in France the slave of an Ambassador. He refers to Kirchener, (*Legat.*, Lib. 2, c. 1, num. 233,) as disapproving of this. Bynkershoek agrees with him ; but their objection is founded on the privileges granted to Ambassadors by international law. Barbeyrac says, in a note, that the decision was made—"En vertu de l'usage reçu en France, et ailleurs, selon lequel un esclave devient libre, dès qu'il a mis le pié dans les terres du país. Voiez les auteurs, cités par Groenewegen, *De Legib. Abrog. ad tit. Instit., De his qui sui vel alieni juris*, p. 5. Mais ici l'esclave, en-qualité d'homme appartenant à l'Ambassadeur, est regardé comme n'étant point dans le país." But this objection to it makes the precedent stronger in the case of private persons.

In the negro case, 15 Causes Cel. p. 12, Loysel's *Institutes* is cited as mentioning the same or a similar case occurring in 1571.

thence to go home to Geneva, and so not to be bound to the laws of France. In the end he requested that if they needs deal so hardly with him, as to set at liberty another slave, yet they should at least restore unto him the money he had cost him : whereunto the Judges answered, that it was a matter to be considered of. In the mean time the merchant, being lest he should lose both his dutiful slave and his money, of himself set him at liberty, yet covenanting with him that he should serve him so long as he lived.”<sup>1</sup>

In the French edition, Paris, 1577, the corresponding passage is as follows. “Et me souvient estant en Tholouse qu’un Gènevois, y passant, fut contraint d’affranchir un esclave qu’il avait achepté en Espagne, voyant que les Capitouls le vouloient declarer franc et libre, tant en vertu de la coutume generale du Royaume, que d’un privilège spécial, que l’Empereur Theodoze le Grand leur donna, ainsi qu’ils disaient, que l’esclave mettant le pied en Tholouze etait franc ; chose toutefois qui n’est pas vrai-semblable.”<sup>2</sup>

In the argument of the case of Jean Boucaut and others, claimed as the slaves of Verdelin in the French Causes Celebres. tom. 15, p. 12, a case is mentioned as having occurred in 1552, at the siege of Metz, where a demand having been made upon the Spanish General, for a slave who had escaped into the city, upon M. de Guise commanding the place, the latter, “répondit que la franchise que l’esclave avoit acquise dans la ville de Metz, selon l’ancienne et bonne coutume de France, ne permettoit pas de le lui rendre.”

<sup>1</sup> In the original, after this mention of the contract for a life service, is the phrase “qui est une chose rejeetée en terme de droit”—this apparently has been omitted by the English translator. The meaning is probably that such a contract would not be enforced by a legal tribunal.

<sup>2</sup> From the remainder of the passage it appears that the author’s doubt does not refer to the correctness of the rule, but to its origin ; that is, whether it was a local or municipal rule derived from a special Imperial decree. He argues that no Roman colony nor even Rome itself ever had such a privilege in the time of the Roman Empire, and refers the decision to the *general custom of France*—“la vertu de la coutume générale du Royaume.” The language of the ordinance of Tholouse is given by Mr. Justice Campbell, 19 Howard, 497, and his argument in support of the doctrine, thus repudiated by Bodin,—that the law or principle was derived from “special ordinances or charters.”

Two other instances are cited by M. Tribaud in Causes Celebres, tom. 15, p. 82, of slaves having been declared free in Thoulouse, after having escaped from

Barrington on the Statutes, p. 254, note, says, "It appears from Boulainvilliers, that the question was formerly much agitated in the French courts of justice :<sup>1</sup> but in the *Institutes Coustumières*, (published at Paris, 1679,) it is laid down with great precision that a slave becomes free as soon as he enters the French territories and is baptized. "Toutes personnes sont franches en ce Royaume, et si-tost qu'un esclave a atteint les marches d'iceluy se faisant baptiser est affranchi."

In a treatise entitled, *Remarques du Droit François, &c.*, 4to. Paris, 1680, par M. H. M. Advocat, p. 11, commenting on the title *De Jure Personarum*, it is said, "La France n'admet point de différence des personnes, sçavoir d'estre libre ou serf, car par la loy générale de ce Royaume toutes les personnes sont libres et franches et l'on observe le premier article de la Coutume de Bourg. qui ordonne de la sorte. C'est pourquoy quand un serf et un esclave se refugie en France, aussi-tost qu'il en a atteint les marches et qu'il s'est fait baptiser, il est affranchy."<sup>1</sup>

Argentré, tom. I. p. 4, is another authority cited, 1 Burge, p. 738, to the effect that slaves on entering France became free.

§ 262. According to Heineccius, in a note as editor in 1726, *Lugd. Batav. to Vinnius' Commentaries*, Lib. I. tit. 3, the law of Germany differed from that of France and Holland, at least in respect to fugitive serfs. After referring to Bodin, Charondas, Gudelin, Zypæ, etc., as authority for escaped slaves becoming free,—"*Itaque, in Belgis et Gallia, et servi ipso jure liberi fiunt*

<sup>1</sup> It is to be observed that at this time serfdom, as the condition of a Christian European, still existed in France. The author of the work last cited in the text adds to the statement there quoted—"Il est vray qu'en Bourgogne, il y a des mortuables, que la France peut appeller *adjectos glebas*, c'est à dire, des hommes tellement attachés, à la terre qu'ils ont pris par emphyteose, qu'ils ne la peuvent quitter. Ce qui est un espèce de servitude." And Bodin, at the page last cited, says,—"I have seen the Lord of the White Rock in Gascongne claim to have not only a right over his manumised subjects, and also that they were bound to trim his vines, to till his grounds, to mow his meadows, to reap and thresh his corn, to carry and recarry whatsoever he should command them, to repair his decayed house, to pay his ransom, and also the four accustomed payments used in this realm; but also that if without his leave they should change their dwelling places wherein they were born, or depart out of his land, he might lead them home again in a halter; unto all which the aforesaid services his manumised people yielded, saving unto the last, which by a decree of the Parliament of Thoulouse was cut off, as prejudicial unto the right of liberty." This is noticed in argument of the negro case, vol. 15, *Causes Célèbres* (ed. Amsterdam, 1766,) p. 11. See *Mainmorte* in *Encyc. Fr.*, 20 Howell's State Tr. p. 1370. An edict of Louis XVI., 1779, was for the abolition of this kind of serfdom.

eo adventatantes. Ast in Germania non solum dominis conceditur ut possint homines proprios vindicare, etsi eo profugerint ubi illa servitus non sit recepta (vid. Dan. Mevii Consil. jur. de statu et vindicatione hominum propr.) verum etiam quibusdam locis, ipso jure fiunt servi quicunque perigrini eo adveniant, emorandi et habitandi causa, veluti in Algonia, ubi ideo sapienter auditur paroemia : *Die Luft macht eigen*, id est, ipse aer homines proprios facit. Hert de homin. propr. sect. 3, § 3. Tale olim fuit jus Wildfangiatus in Palatinatu electorali et provinciis vicinis, de quo Londorp. Act. Pub. Continuat. Lib. 10, p. 126."

By the private international law of these provinces then, the peaceful alien, not protected by some special treaty, and whatever condition at home, was regarded either as a stray chattel which the lord of the soil might appropriate, or an enemy who might be enslaved ; as under the doctrine of the early Roman law. See *Ante*, p. 151, note 2. The passage indicates a disregard of all private international law as a protection for aliens, whether bond or free. The right accorded to feudal lords of reclaiming their serfs, was an effect of a law prevailing as between the different petty sovereigns recognized in the constitution of the German empire, at a time when feudal bondage still existed in the respective dominions of each.<sup>1</sup>

§ 263. To the Flemish and French authorities, before cited, so far as they justify the international disallowance of the master's claim of ownership, it may perhaps be objected that the distinction of race which, in the fourth chapter, was described as having about the close of the 15th century acquired recognition in universal jurisprudence—the *law of nations*—supporting the chattel slavery of Moors, Negroes and Indians, was not noticed, and that the rule given by these authorities should be taken to apply only to European serfs, bondsmen under feudal

<sup>1</sup> In Dred Scott's case, 19th Howard 495, Mr. Justice Campbell cites, from the Capitularies of Charlemagne a rule for the rendition of fugitive slaves. Chattel slavery as well as serfdom, was probably then prevailing in all the dominions of this Emperor. See *Ante*, p. 159, n. Other similar laws of that time might have been cited. "Etiam Caroli M., Ludovici Pii et Lotharii leges de servis superantur Lib. 44, Car. M. et Longob. Imo et Guilielmi Siciliæ Regis et Frederici Imp. tant de servis fugitivis constitutiones in plac. Neap. Sed ab hoc tempore id est A. C. 1212, aut non multo secus, Christiani se mutuo in servitutem redigere desierunt." Habernus, *Prælectiones*, Lib. I. tit. IV. 6.

lords. In the case of Jean Boucaut and others, claimed as slaves by Verdelin, at Paris, in the year 1738, (*Causes Célèbres*, ed., Amsterdam, 1766, tom. 15, p. 30,) M. Tribaud, the advocate for the owner, endeavors to limit the extent of the general principle according to the distinction of race ;—"Le principe est vrai dans le cas où tout autre esclave qu'un esclave nègre arrivera dans ce Royaume."

Two instances of the application of the same rule to Moors or Mohammedans are given by the Procureur du Roi, advocate for the negroes, in the same case, p. 51, "Dans le Journal Chronologique et Historique de D. Pierre de Saint Romuel on voit qu'en l'année 1571 une marchande de Normandie ayant amené a Bordeaux plusieurs Maures pour les vendre, le Parlement de Guyenne, par un arrêt solennel, les mit tous hors de l'esclavage, parceque la France, mère de liberté, ne permet aucun esclave." He also relates that in the time of Henri III., the Mohammedan captives held as galley slaves in a Spanish public ship, stranded on the French coast, were set at liberty by the king's decree, and sent to Constantinople, notwithstanding the protest of the Spanish ambassador.

The question of ownership in the first case might, from the domicil of the trader and her intention to sell in France, be said to have belonged to internal, not international private law ; and the second cannot perhaps be properly considered a judicial precedent, since it was a direct exercise of the sovereign power, to be distinguished from the action of judicial tribunals.<sup>1</sup>

This case of Boucaut and Verdelin, which was argued before the French admiralty, is the only one similar to that of

<sup>1</sup> There is an *Abrégé de la Republique de Bodin*, published, London, 1755, chez Jean Nourse, two volumes, 12mo. The preface has no signature. In this abridgment, L. 1, c. 9, it is said, "La France \* \* elle a même voulu depuis, que tout homme qui mettroit le pied sur ses terres fut libre dès ce moment, sans faire attention qu'il est contre le droit des gens d'enlever à l'étranger passant et maître de l'esclave, un bien qui lui appartient. Les façons de penser sont de mode chez les Français comme les ajustments. Lorsqu'une opinion saisit les esprits elle en devient l'idole."

There is no such remark in the unabridged edition, Paris, 1577, fo., nor can any similar observation be found in Knolles' translation. The *Abrégé* appears to be that of the President de Lavie, which he afterwards recast and published in 1760, under the title—*Des corps politiques et de leurs gouvernements*. (See Brunet's *Manuel du Libraire*, Tome 1, p. 886.) From which it may be inferred that he had introduced much of his own thought into the *abrégé*.

Somerset and to the Scotch case which is recorded as having occurred in France.

§ 264. In the case occurring at the siege of Metz, the liberty of the escaped slave was declared to be the legal effect of the general customary law of the kingdom—l'ancienne et bonne coutume de France. In those mentioned by Bodin, occurring in Paris and Thoulouse, the freedom was claimed under certain special grants to those cities, declaring that slaves escaping into their municipal jurisdictions should thereby become free. The slaves of Verdelin were also in Paris, and it is important to distinguish whether the judicial decision in their favor was made under the charter of Paris, regarded as a legislative act, altering a rule of the customary unwritten law of the land, or was based on the latter and general principles of private international law therein contained.

Mr. Justice Campbell in *Dred Scott's* case, 19th Howard's Rep., p. 497, after citing the cases mentioned by Bodin, observes, "The decisions were made upon special ordinances or charters, which contained positive prohibitions of slavery, and where liberty had been granted as a privilege; and the history of Paris furnishes but little support for the boast that she was a "*sacro-sancta civitas*," where liberty always had an asylum, or for the "self-complacent rhapsodies" of the French advocates, in the case of Verdelin, which amused the grave lawyers who argued the case of Somerset.<sup>1</sup> The case of Verdelin was decided upon a special ordinance, which prescribed the conditions on which West India slaves might be introduced into France, and which had been disregarded by the master."

It would be more accurate to say, that the *claim* of Verdelin was based upon a special ordinance, &c., or that claims like that of Verdelin might have been supported by the special ordi-

<sup>1</sup> Mr. Justice Campbell and "the grave lawyers who argued the case of Somerset," may have had good cause to undervalue the character of Paris as an asylum for liberty; in view of the acts of arbitrary power which had occurred there at various times. But the political or civil misfortune of the Parisians has not the slightest bearing on the question of legal *status*, as a question of international law. Compare ante, § 47, and note. "The force of these examples is not weakened by the reflection that they were furnished by what was at the time an undeniably despotic state." 1 Phillimore, p. 342.



nance. The *case was decided* in favor of the freedom of the negroes, upon the unwritten or common law of France, as indicated in the authorities and precedents before cited, taking effect in the failure of the master to bring his claim within the protection of positive legislation—the edict of Louis XV., 1716—allowing a certain class of French colonial subjects to bring their slaves into France under certain limitations.<sup>1</sup> The detention on the part of the master was sought to be justified on the ground that he had substantially complied with the requisitions of the edict of 1716; and further, while it was admitted that, under the customary or unwritten law of the kingdom, foreign slaves or the slaves of foreigners would become free by being brought into France, it was also urged that the right of the French colonist rested on the juridical will of the *national sovereignty* expressed in the edict of Louis XIV., 1615, known as the Code Noir, and was therefore a legal right in every part of the French empire; that the edict of Louis XV., 1716, only gave additional protection to that right in certain cases, but never had the effect of destroying it, and that therefore no French tribunal could refuse to recognize the right of such colo-

<sup>1</sup> Therefore the language of Mr. Justice Campbell on page 499 of the Report, is open to material exception, where he says—"This sentence [in *Somerset's case*,] is distinguishable from those cited from the French courts [apparently intending to include the case of Verdelin's slaves] in this: that there positive prohibitions existed against slavery, and the right to freedom was conferred on the immigrant slave by positive law; whereas here," &c.

The preamble to the edict shows that the prevailing doctrine had been that in such cases slaves became free by the unwritten law, "Comme nous avons été informés que plusieurs habitants de nos îles de l'Amérique desireroient envoyer en France quelques-uns de leurs esclaves, pour les confirmer dans les instructions et dans les exercices de notre religion, et pour leur faire apprendre quelque art et métier, dont les colonies recevroient beaucoup de utilité, par le retour de ces esclaves: mais que ces habitants craignent que les esclaves ne prétendent être libres en arrivant en France, ce qui pouvoit causer aux dits habitants une perte considerable et les détourner d'un object aussi pieux et aussi utile." Provision is then made by Art. 2, 3, that the colonists may bring with them slaves, for the purposes mentioned; being required to obtain permission from the governor in the colony, and also to register themselves in the district of disembarkation in France. The 5th article is as follows, "Les esclaves nègres, de l'un et de l'autre sexe, qui seront conduits en France par leur maîtres, ou qui seront par eux envoyés, ne pourront prétendre avoir acquis leur liberté, sous prétexte de leur arrivée dans le Royaume, et seront tenus de retourner dans nos colonies quand leur maîtres le jugeront à propos. Mais faute par les maîtres des esclaves d'observer les formalités prescrites, par les precedens articles, les dits esclaves seront libres, et ne pourront être réclamés." M. Denisart, *Décisions, Nouvelles*, tit. *Nègres*, as cited by Mr. Hargrave in 20 Howell's State Trials, p. 28, n., appears to have considered the edict, in protecting the master's right, as an alteration of the common law in France.

nist, whatever might be the rule of private international law contained in the customary law of France applicable to aliens and their slaves.<sup>1</sup>

In 1758, Francisque, a negro slave bought by his master in Hindostan, was brought by him to France. Francisque claimed his liberty: his master contended that he had carefully fulfilled the formalities prescribed by the "Code Noir;" it was answered that this law only affected African and American slaves, and could not be extended to the East Indies. The slave obtained his liberty.<sup>2</sup>

§ 265. If, then, at a date shortly before the American Revolution, the practice of British and European judicial tribunals and the writings of private jurists indicated any rule respecting the international recognition of the right of an alien owner and the co-relative obligation of his slave existing under the law of

<sup>1</sup> Tribaud, for the master, says, 15, C. C., p. 80, "On ne connoit point, il est vrai, d'esclave en France, et quiconque a mis le pied dans ce Royaume est gratifié de la liberté. Mais quelle est l'application, et qu'elle est la distinction, du principe? Le principe est vrai dans le cas où tout autre esclave qu'un esclave nègre arrivera dans ce Royaume." But he then proceeds to limit the exception still further, applying it only to slaves domiciled in the French colonies. He does not even allow the right to a French merchant arriving in the kingdom with savages whom he should claim to be his slaves. "Par exemple, qu'un étranger, qu'un négociant François, arrive dans ce Royaume avec des sauvages qu'il prétendra être ses esclaves: qu'un Espagnol, qu'un Anglois vienne en ce Royaume, avec des esclaves nègres dépendans des colonies de sa nation; voilà le cas dans lequel par la loi, par le privilège de la franchise de ce Royaume, la chaîne de l'esclavage se brisera, et la liberté sera acquise à de pareils esclaves." And to the same effect on p. 26.

<sup>2</sup> 1 Phillimore's Internat. Law, p. 842, citing Denisart, Décisions Nouvelles, tom III, p. 406, tit. Nègre, n. 45.

From some of the Flemish and French authorities which have already been cited, it appears that the condition of absolute slavery was lawful in Spain and Portugal during 16th and 17th centuries. Absolute slavery, as a condition distinct from serfdom or vassalage, is recognized in Las Siete Partidas. (A. D., 1308), Part. IV., tit. 21, l. i.—"Son tres maneras de siervos; la primera es de los que cativan en tiempo de guerra seyendo enemigos de la fe; la segunda es de los que nascen de las siervas: la tercera es quando alguno que es libre se dexa vender."

From the following it would appear that slavery had become unknown in Spanish law, except as the condition of a negro domiciled in the Indies. Asso and Manuel, Institutes, &c. Johnston's transl. of the 6th ed. Book I., tit. v., c. 1. "With regard to their civil state or capacity, men are considered, 1, as natural born subjects of their kingdoms, and as aliens or foreigners; 2, as nobles, persons entitled to the rights of nobility (hidalgos), knights (caballeros) and plebeians; 3, as laymen and ecclesiastics. The distinction into free men and slaves, which is found in our law in p. 4, tit. 21 and 22, is not now observed or acknowledged, unless it be with respect to the negroes employed in the Indies in working the mines, or held in slavery by private individuals, but even as regards this circumstance, it is foreign to this treatise."

In Denmark, negro slavery would probably have been recognized under the code of Christian V., already cited, *Amt*, p. 291.

their domicil, that rule was, it would seem, that in a country wherein the condition of slavery could not exist as an effect of the internal or local law, or wherein no domiciled subject of whatever race or complexion could be held in slavery, the co-relative rights and obligations of masters and slaves, domiciled in other countries, could not be protected and enforced by the judicial tribunals of the forum.

§ 266. A passage has herein been noted from the President de Lavie's Abrégé of Bodin's Republic, in which the author of the abridgment says,—objecting to what he admits was the judicial practice in France,—that it is contrary to the law of nations to take from the stranger, passing through the country and being the master of a slave, a property (*un bien*) which belongs to him.

If any other juristical authority of an earlier date than Somerset's case is extant, thus, in terms, maintaining the claim of the owner when in a foreign country, it seems to have escaped the observation of the jurists whose research has, since that time, been directed to these inquiries.

There are, however, certain passages in the treatises of Grotius, Pufendorff and Vattel which have been cited, in recent cases, as sustaining the same doctrine; the doctrine thus enunciated being at the same time *supposed to operate as private law*; that is, a rule by which the rights and duties of private persons might be determined by judicial tribunals.

These writers must be taken to have been of no less authority shortly before the date of Somerset's case than they are at present, and it is now proposed to examine here, what the doctrine is which they support, and how far they may have considered it applicable to questions of personal status.<sup>1</sup>

§ 267. These authors, it will be recollected, proposed to write of the law of nations regarded as that rule of which nations, in their political personality, are the subjects; being a law

<sup>1</sup> Pufendorff's Treatise de Jure Nat. et Gen., was published about 1672, a translation in French appeared in 1712, if not earlier, and an English version in 1717. The work of Vattel on the Law of Nations first appeared in 1758; a posthumous edition with the author's manuscript notes in 1773. The principal English version was published in 1797.

in the imperfect sense. The rights which they define are rights belonging to nations, in respect to other nations and their subjects, and the duties are the duties of nations, towards other nations and their subjects.

This is more particularly true of Vattel,<sup>1</sup> whose writings are most relied upon in maintaining the doctrine above stated. The passages in his treatise which have been cited to sustain it, are in Book II., chapters 8, 9, and 10 ; on reference to which it will be seen that he holds it to be the duty of every state, under the law of nations, to allow the subjects of other states a transit or passage through its territories with their property, and that, correlatively, the subjects of any one state have a right to pass through the territories of other states, with their property.

This right, in the citizens or subjects of any one state, he describes as existing in two conditions or degrees ; corresponding to two different degrees of duty in all other states, thus—

a. There is a right in private persons,<sup>2</sup> founded in their necessities or circumstances, which makes it the imperative duty of a state to allow strangers to enter and leave, and sometimes to pass through its territory, and to carry with them such property as may be necessary for the objects in respect to which their entry or transit is necessary.<sup>3</sup>

b. There is a less perfect right, arising out of circumstances in which a less imperative duty is laid by the law of nations upon states, requiring them to allow what Vattel denominates “innocent passage” to strangers and their merchandise, even when no such necessity exists as in the former case ; thus giving a correlative right to such strangers, to enter and leave or to pass through the territory with their property.<sup>4</sup>

<sup>1</sup> See Vattel, Preliminaries, §§ 1, 2, 3.

<sup>2</sup> The persons spoken of here are private individuals ; a large part of the discussions of the older writers on the right of transit, refers to the passage of armies and bodies of men having a political unity and national character. Puf., B. III., c. 3, § 5 ; Grotius, L. II., c. 2. Vattel also speaks of such cases. B. II., §§ 116–124, in ch. IX.

<sup>3</sup> Vattel, B. II., § 123, in ch. IX., § 135, in ch. X.

<sup>4</sup> Vattel, B. II., §§ 132–4, in ch. X.

Pufend. B. III., c. 3, § 86, “Among these matters of harmless profit which nature engages us to allow freely to all men, Grotius reckons the permitting goods and merchandise to be carried through our dominions.” Pufendorff and Grotius seem to

§ 268. The extent of the rights of strangers under this rule is further defined by Vattel, when he shows what the state, in view of its duty in this respect, may not do, and from what portions of the ordinary powers of sovereignty such strangers are exempted. Thus he says that the stranger is still a member of his own nation and treated as such, (B. II., § 107 :) the state cannot claim any power over the person of the foreigner, that is, to detain his person within its territorial dominion, except where he violates its laws, (§ 108 :) it cannot require of him those personal services which it may require of its own citizens, he is not subject to those "laws which have relation to the title of citizen or subject of the state," (§ 101,) that is, the law which determines the rights and duties of private persons in a relation between them and the state regarded as their sovereign. "He cannot indeed be subject to those burdens that have only a relation to the quality of citizen," (§ 106.)

And, as regards the duty of the state towards the stranger in relations with respect to things, the state does not acquire over the property which he has with him, nor even over what he may there acquire, the same power which it has in respect to the property of a citizen, (§ 109.) The property which he brings with him does not cease to belong to him, merely on account of his having come to a foreign country, (§ 109 :) the state, in reference to which he is an alien, cannot take it away, nor attach burdensome conditions to its possession or enjoyment; and he is not subject to pay ordinary taxes levied on citizens, but only such as are laid for public improvements of which he, in common with the citizen, has the benefit, such as tolls, on rivers and roads, harbor duties, &c., (§ 132-144.)<sup>1</sup>

Not only is the right of the stranger, as a private person, to be respected, but his property is to be regarded as part of the wealth of the country of which he is citizen, § 104, 81 : in con-

found the right on a general right in all mankind to use the earth for purposes of commerce, and they limit the right of bringing property to cases where it is brought for gain. Pufendorff connects the inquiry with the propriety of markets *of the staple*, to which, in some countries, foreign traders were then restricted; being also obliged to buy of, and sell to citizens only.

<sup>1</sup> And Puf. B. III., c. 3, § 6, discusses the question of levies on passing rivers and straits; such as the Danish Sound levies.

sequence of which its possession, after his decease in the foreign country, is to be determined not by its laws, but by those of the former, (§ 109–113.)

§ 269. No mention is made of slaves, as property or otherwise, by Vattel: but taking the term “law of nations,” as used by Lavie, to be equivalent to the same term as used by Vattel, *i. e.*, as a law acting on nations as its subjects, the proposition of the former—that it is contrary to the law of nations to take from the stranger a property which belongs to him—is equally maintained by the latter.

But to whatever degree this maxim may limit the power of a state, in reference to strangers, there must be some standard, included in the rule, of what is and what is not property. The duty of the state and the correlative right being created by international law, a law acting on nations as its subjects, the standard of property or the definition of property, must be one included in that law.<sup>1</sup> And so far as these writers, Pufendorff, Vattel, and others, are relied on as the authority for the rule, their definition or description of property is receivable in interpreting the rule.

§ 270. Now Vattel and Pufendorff are among those who assume the existence of a law of nature; that is, a law which they, individually, derive *a priori*,<sup>2</sup> which they declare is the law binding on all mankind, and they define the law of nations to be the same law applied to nations, states, or independent sovereignties, as its subjects.<sup>3</sup> It would appear therefore that the opinion of these authors, as to what is, or is not property by the law of nature, must be received in applying a rule stated by them as acting on nations as its subjects. If these authors do not recognize men as things by the law of nature, or if they declare that all natural persons have, by the law of nature, rights which are inconsistent with the legal quality of *things*—

<sup>1</sup> Nothing being said to imply that it is determined by the national law of a single state. The criterion is therefore independent both of the criterion of property in the state wherein the claimant is a foreigner, and that whose citizen or subject he is.

<sup>2</sup> Compare *ante*, p. 16, note 4.

<sup>3</sup> Vattel, Prelim., §§ 4, 5.

objects of action, or objects of possession and property—no nation, as a subject of the rule above stated, is bound to recognize any natural person as a chattel or thing, the object of property or possession. Vattel makes no mention of slavery in his works, and, in sec. 4 of the Preliminaries, says: “It is a settled point with writers on the natural law that all men inherit from nature perfect liberty and independence, of which no man can be deprived without their own consent.”<sup>1</sup>

§ 271. This criterion for determining whether Vattel and Pufendorff intended, in using the term property in a rule of international law, to recognize property in slaves, should be sufficient to decide the question so far as the rule rests upon their authority. But if the rule is received independently of any particular jurist, and if it is proper, in matters of *law*, to reject all *a priori* statements of a law of nature, still a standard of what is not property, embraced in international law, must somewhere exist. This can only be the law of nature derived *a posteriori*, or those definitions, rules, maxims, &c., which, in point of fact, have been recognized by nations (whether they ought or ought not to be so recognized.) And this is nothing more than universal jurisprudence or the *law of nations*, in that sense, which may enter into *public* international law as well as into *private* international law.<sup>2</sup>

This *law of nations*, universal jurisprudence, is changeable; but the applicability of the rule above stated to a question of personal condition or status, at the time referred to, would depend upon the question—whether, in point of fact, the *chattel* slavery of natural persons was or was not customarily recognized by nations in their respective municipal (national) laws.

§ 272. It will be seen that, in this view, the question of the right of a stranger to hold slaves *as property* or chattels, under

Pufendorff considers the legal nature of slavery very fully in B. III., c. 3, § 6. I., c. 3, §§ 2, 8, taking the same view; while admitting the lawfulness of bondage or slavery of legal persons. In B. IV., c. 4, treating of the origin of dominion or property, he ascribes it to human compact or institution; but, it must be noticed, that he means the right of private property as opposed to community, not the distinction of property from persons.

Compare *ante*, §§ 10, 19, 49; and see 1 Phillimore Int. Law, § 228, and Appendix I.



the rule laid down by Vattel, is almost identical with that which, it has herein been supposed, would have existed in the different parts of the British empire during the colonial period;—whether the right of the master, of British race or descent, in respect to his African or Indian slave, was a “common law right,” or incidental to the common law right of property and to be supported, as such, in every part of the empire. In each case the question is of the recognition of slavery in universal jurisprudence, the historical *law of nations*.

The support given to slavery by this international *rule of transit*, considered in this connection, will therefore be hereinafter ascertained, when pursuing the inquiry, how far slavery could be supported by recognition of the common law right of the master.

§ 273. But, aside from this question of what shall or shall not be considered *property*, Vattel does not say that, in consequence of the state's duty, created under international law, the law of the state will not affect the stranger in his person or property; or that his relations towards other persons, either in respect to persons or in respect to things will not be affected by the law of the state in which he is found. On the contrary, he states that, with the exceptions already mentioned, the general private law of the forum applies to strangers as well as citizens, or as he says, “the general laws made to maintain good order and which have no relation to the title of citizen or of subject of the state,” &c. (B. II., § 101.) And although in this place the thought of the author was principally directed to that part of the laws which maintains good order by a system of police and punishment, yet the whole passage shows that in these “general laws” he intended to include that law which decides on the possession and security of property, or what is sometimes called “the law of *meum et tuum*.”

In the next section, (§ 103), Vattel declares, “For the same reason, [i. e., this subjection to the “general laws,”] disputes that may arise between foreigners or between a foreigner and a citizen, are to be determined by the judge of the place, and according to the laws of the place.”

§ 274. Thus far in this inquiry into the doctrines of these foreign publicists, the right of the stranger has been considered as one existing under *public* international law, or in other words, as a right correlative to a duty on the part of the state. But, according to the principles which have been stated in the first and second chapters, these duties and their corresponding rights are not within the sphere of judicial tribunals, determining the rights and duties of private persons, whether citizens or foreigners.

It has been observed in the second chapter that there is much, in the treatises on private international law or the conflict of laws, to justify the idea that a court is to regulate its conduct by public international law and to determine the rights of private persons, by first ascertaining what the *duty* of the state is under international law. Supposing then that this may be done, that strangers may, under this international rule of transit, have a right as against the state, yet it would seem that a tribunal could recognize it only when correlative to an absolute *duty* on the part of the state. Now, according to Vattel's distinction, no nation is *bound* by international law to admit strangers with their property in all possible circumstances. The ordinary entry and departure of strangers is not, according to Vattel, founded on a right and duty thus imperatively justified by international law. It is only in circumstances creating some degree of necessity that the duty is created for the state, and the nature of the property that may be introduced under the correlative right is restricted by those circumstances. It would seem that the courts can recognize slave property in such cases only ; if its recognition is to depend on this rule of international law ; and that the ordinary or "innocent passage," which is not accorded in view of any such obligation, does not give the stranger, being the master of a slave, any such exemption from the laws of the forum.<sup>1</sup>

<sup>1</sup> Pufendorff, B. III., c. 3, § 6. "For, truly speaking, the law of humanity does not seem to oblige us to grant passage to any other goods except such as are absolutely necessary for the support of their life to whom they are thus conveyed." And in § 7,—"as the case is very different whether a man desires way through my grounds, because without this privilege he would be, as it were, excluded from the

§ 275. It is the palpable impossibility of determining a right in private persons, when the correlative duty on the part of the state is indeterminable, that has originated a juristical belief in the doctrine of comity as commonly understood ; the comity of the nation applied, by the court, *for* the nation : the court in that case determining how far the state ought to admit the laws of other states to take effect on persons and things within the territorial jurisdiction of the former.<sup>1</sup>

If a state or a government which had allowed strangers to enter its territory and which had not exercised any control over them should permit its citizens, as private individuals, to injure them in person or in property, that state or government would not, of course, be fulfilling the duty defined by Vattel. But when strangers appear before judicial tribunals, claiming rights or being required to perform certain duties, the judicial and administrative officers of the state do not direct their conduct in view of any particular duty of the state towards the strangers. The courts have only to apply a rule of action for private persons derived from the *will* of the state without reference to the *duties* of the state. The question before them may be, whether the state does or does not will that they should recognize the relations of the stranger as they would exist in the place of his domicil. In ascertaining the will of the state on this point, they may, in the absence of positive legislation, refer to the usage and practice of other nations in like cases, (that is, to what they have done, not to what they ought to do,) and to the writings of private jurists so far as they are expository of that practice.<sup>2</sup>

Vattel, as has been shown, says that the law determining the rights and duties of the foreigners is the law of the forum of jurisdiction. This proposition is strictly true, as a proposition of *public international* law. The law which the judicial tribunal must apply, is part of the municipal (national) law of

world and confined to solitude, or because he could not otherwise carry off the fruit of his own land ; and whether he makes the same demand purely to shorten his passage, and imposes a burthen upon my estate, not to relieve his own necessity, but to promote his convenience and ease."

<sup>1</sup> *Ante*, p. 73, 74.

<sup>2</sup> *Ante*, § 93.

the forum, since it exists or is law by the juridical will of the sovereign of that forum independently of the will of every other state or sovereign. The just limits of his subject did not allow Vattel to go further and explain the duties of judicial tribunals. This would have been entering the limits of private international law. It does not necessarily follow that he would have said that the tribunal could never recognize legal effects produced by the law of a foreign state.

§ 276. The general principles considered in the second chapter will operate in cases wherein there is no precedent. But the courts may always refer to the international practice of other countries, which they may assume indicates a customary law prevailing in all countries, their own included. When such customary law has been ascertained the courts may apply it, not as indicating *the duty* of the state, but as indicating *the will* of the state. And it is highly important to observe that the rule sought is *customary private law*—the law customarily applied by *judicial tribunals*, as known by *judicial precedents* and authors who treat of international law as it obtains, not as it ought to obtain. A statute enactment therefore, or an act of the sovereign, as such, is not indicative of this rule of customary law ; on the contrary there is a presumption that such statute or act differs from the rules which judicial tribunals might lawfully enforce in like circumstances.<sup>1</sup>

Now, as has been shown, the judicial practice and the writings of private jurists on the customary law of Europe during the 17th and 18th centuries, are unanimous in declaring the rule to be against the international recognition of slavery in countries where it cannot exist under the local or internal law : they make no exception.<sup>2</sup>

§ 277. The right of the foreigner or stranger to the possession of property which he may bring with him may be main-

<sup>1</sup> *Ante*, § 258.

<sup>2</sup> If there has been any exception, it would appear to have been where states have been so situated, geographically, that the passage of the citizens of one through the territory of the other, is indispensable to ordinary commercial access with the rest of the world, or where different states lie on a river or strait, in the common use of which, the subjects of one state must unavoidably be sometimes found within the limits of another.

tained before a tribunal as a right recognized by universal jurisprudence, or the *law of nations* in the same sense. But this is only when the citizen's right to such property might be equally ascribed to that law. While the stranger is husband or wife, father or child, in the forum to which he is alien, and owns property brought with him and acquired in the place of his domicil, and has rights, in these respects, as fully as the citizen who is husband or wife, father or child, and owner of property—his rights are recognized by that part of the law of the land which is universal jurisprudence, supposed to be the same, in its origin and effect, in the forum as in the place of domicil, though in each it is maintained by a different sovereign or source of law. At the time when Bodin wrote he could perhaps say of slavery that it was then “approved by the great argument and consent of almost all nations,”<sup>1</sup> and he might therefore have excepted to the decisions of the French courts, on the ground that by refusing to maintain the right of the master to his slave, they had decided “contre le droit des gens,” meaning universal jurisprudence. It does not appear, however, that Bodin ever took exception to the decisions of the French courts in respect to the slaves of strangers, either as being contrary to the “law of nations,” in any of its significations, or on any other ground.<sup>2</sup>

<sup>1</sup> *Ante*, p. 165, note.

<sup>2</sup> From an examination of two French editions and the English version. In *Repub. Lib. I.*, c. 2, ad finem, Bodin says,—“For as for the laws of nations, if they be any of them unjust, the prince may abrogate them by the law of his realme, and forbid his subjects to use the same; as we said before of servitude and slaves, which, by a dangerous example, by the law almost of all nations brought into commonweales, was againe by the wholesome decrees of many princes, well agreeing with the laws of nature, taken away.” (Knolles’ Tr., p. 118.)

## CHAPTER IX.

### OF THE PRIVATE INTERNATIONAL LAW OF THE COLONIAL PERIOD AFFECTING CONDITIONS OF FREEDOM AND BONDAGE—THE SUBJECT CONTINUED—EXAMINATION OF SOMERSET'S CASE IN THIS CONNECTION.

§ 278. The case of Somerset, being the leading precedent in English law, and having occurred shortly before the separation of the colonies from the mother country, has been the subject of much juristical comment. It will now be here attempted to indicate the law applicable in the various jurisdictions of the British Empire, at that date, in circumstances similar to those of this case ; deriving that law from the general principles and historical facts which have been set forth in preceding chapters ; and to compare it with this decision, the European authorities just cited, and the supposed international practice of the colonies.<sup>1</sup>

§ 279. The application of the general principles of private international law to the recognition of those relations of private persons which constitute conditions of freedom and its opposites has been shown in the second chapter. It was shown, that in the absence of direct legislation or of judicial precedents indicative of a customary international rule,<sup>2</sup> applicable to the circumstances of the case, the recognition and support of relations of private persons existing under a foreign law, (the law of the alien's domicil,) depends upon

<sup>1</sup> As stated *ante*, §§ 251–254.

<sup>2</sup> *Ante*, § 122. It has been remarked, § 258, that foreign precedents, by the recognition of a customary private international law, may have an authority similar to that of local precedents, though not equal in degree.

an independent judicial recognition of their accordance with natural reason, according to certain criteria. It has been then supposed that they will be supported (so far as their continued existence remains physically possible) if attributable to principles of universal jurisprudence—the historical *law of nations*, and that the relations thus attributed will continue, in the state to which those persons are aliens, as results of the municipal (national) law of the forum ; there being in this case no question of the “ conflict of laws ” or of the comity of nations, although the relations recognized had previously existed under another jurisdiction.<sup>1</sup>

§ 280. The historical evidence of the principles applicable, at different points of time during the colonial period, to the status of private persons, as having the recognized character of a *law of nations* or universal jurisprudence, forming part of the common law of England, has been set forth in the fourth chapter. It was shown, in the account of the origin of municipal (national) law in the English colonies, given in the fifth and sixth chapters, that the slavery of Africans and Indians, (at least while heathen or unbaptized,) introduced from abroad, was actually supported, in the law of the empire and of each colony, by the application of the rule above stated,<sup>2</sup> operating first as private international law, but afterwards taking effect as part of the municipal (internal) law.<sup>3</sup> It has been shown that, whatever may have been the true theory of the location of sovereign power, at that time, over persons who were aliens to the empire, the juridical action of the imperial and colonial authorities in reference to such aliens, and the view taken by each of the *law of nations*, as determining their condition, appear to have been the same ; so far as those sources of law had concurrent jurisdiction in the colonies, and together controlled the international intercourse of those colonies with foreign countries. The two sources of law equally allowed the force of the historical *law of nations* as then known ; and by judicial tribunals, acting under each of those sources of law, a legal distinction

<sup>1</sup> *Ante*, §§ 36, 113.

<sup>2</sup> Unless Georgia was an exception.

<sup>3</sup> *Ante*, §§ 197, 200.



was recognized to exist among alien persons, founded on differences of race, complexion or physical structure, and religious belief. The alien of white or European race and Christian name was recognized as having, by the *law of nations* applied internationally, the status of a legal person and a presumptive claim to the enjoyment of those individual and relative rights, which, under the English common law, constituted irrespectively of political rights, the free condition of an English-born inhabitant;<sup>1</sup> subject to the processes of remedial justice and police laws, including the powers of the state over individuals in reference to religious belief.<sup>2</sup> On the other hand it was shown, in the same connection, that while the bondage of white indentured servants might have been taken for the result of a law peculiar to the colonies, or to the British Empire<sup>3</sup>—the *chattel* slavery of Indian captives and imported Africans was, throughout a long period subsequent to the first settlement of the colonies, based upon a distinct recognition of the *law of nations*—principles of universal jurisprudence as historically known and judicially allowed to have personal extent in all the colonies, under both the colonial and the imperial authority, if not in England also, at the same time.

§ 281. To whatever extent then this *law of nations* or universal jurisprudence, as judicially recognized in any several jurisdiction of the empire, sustained at any period, the slavery of Moors, Africans and Indians, regarded as aliens to the empire, it would have been contemporaneously receivable in the same forum, as sustaining, by the application of the rule above stated, the slave condition of such persons appearing therein as aliens to such several jurisdiction, after they had become domiciled in some other jurisdiction of the empire.

And it may also be said, that so far as it was thus recognized by the *law of nations* of that time, the right of the English or European master was a “common law right” and was supported as such, in each several jurisdiction of the empire, under the common law of *England*, having for him a per-

<sup>1</sup> *Ante*, § § 139, 140.

<sup>2</sup> *Ante*, § 208.

<sup>3</sup> *Ante*, §§ 209, 210.

sonal and national extent throughout the entire national main.<sup>1</sup>

§ 282. The reasons for supposing that the operation of *law of nations*, in sustaining chattel slavery in the American colonies, must originally have been limited to Moors, Africans and Indians, while heathen and unbaptized only, have already been explained.<sup>2</sup> And the colonial statutes have been noticed which contain an apparent recognition of this limitation by terminating the persons who should be slaves, notwithstanding conversion, and which establish rules for the condition of issue, some of which differ from that of the civil or Roman law. It has also been shown that so far as the condition of Christianized negroes and Indians was supported in any one colony, the judicial interpretation of natural reason, (common law) was still distinguishable as the result of the law of that particular colony, (*jus proprium*).<sup>3</sup>

§ 283. It has been noticed in the second chapter, that, when regarded as the condition of a legal person, slavery or bondage is a condition of infinite variety in respect to its incidental obligations and their correlative rights;<sup>4</sup> and it is only in its absolute form—that approaching most nearly to *chattel* slavery—that it can be a condition ascribed, at any time, to the *law of nations*.<sup>5</sup> It has been shown in the fourth chapter, how, by the attribution of legal personality, slavery in the middle ages

<sup>1</sup> *Ante*, §§ 244, 245.

<sup>2</sup> *Ante*, §§ 170, 171, 189.

<sup>3</sup> *Ante*, Laws of Maryland, 1663, c. 30, § 1. Virginia, 1682, c. 1.

<sup>4</sup> *Ante*, § 204.

<sup>5</sup> *Ante*, § 45. 19 Howard's R., p. 624. (Dred Scott's case,) by Mr. Justice Brandeis: "The status of slavery is not necessarily always attended with the same powers on the part of the master. The master is subject to the supreme power of the state, which will control his action towards his slave and this control must be defined and limited by the municipal law. In one state, as at one period of the Roman law, it was put the life of the slave into the hand of the master; others, as those of the American States which tolerate slavery, may treat the slave as a person, when the master threatens his life; while in others the law may recognize a right of the slave to be protected from cruel treatment. In other words the *status* of slavery embraces every condition from that in which the slave is known to the law simply as a chattel, with no civil rights, to that in which he is recognized as a person for all purposes, save the complete power of directing and receiving the fruits of his labor. Which of these conditions shall attend the *status* of slavery, must depend on the municipal law which creates and upholds it."

By Mansfield, in *Somerset's case*, *ante*, p. 191. "The power of a master over his slaves has been extremely different in different countries."

<sup>6</sup> *Ante*, § 112.

The character of a *constitutio juris gentium*, and became a bondage resting on the *jus proprium* of some one country.<sup>1</sup> And it may be assumed that no condition of bondage, other than chattel slavery has ever acquired recognition in universal jurisprudence—the *law of nations*, in that sense.

Now it may be questioned whether the condition of slavery which was maintained in the colonies was, in all or even in any, throughout the colonial period, that absolute *chattel* condition under which African negroes had been known as personal or movable property, in the customary law of trade and commerce, the *law merchant*; and whether the personality of slaves was entirely denied, as it had been at the first introduction of negroes. In Virginia they had, at one time, been declared real estate and not chattels.<sup>2</sup> In the same colony and in Maryland they had been classed as legal persons by being rated for the poll-tax, which was also imposed on free white persons.<sup>3</sup> In some of the northern colonies, their condition as subjects of legal rights and obligations was little distinguishable from that of indentured white servants, except by the duration of the service.<sup>4</sup>

Slavery or bondage thus modified, was the result of the *jus proprium* of the colony, and could not receive international recognition in other parts of the empire as the *same slavery* which had found place in the law of each colony as a *constitutio juris gentium*—a condition recognized by universal jurisprudence.

§ 284. *a.* Neither (when the condition of slavery had thus changed its legal character in the place of domicil) could the

<sup>1</sup> *Ante*, p. 159.

<sup>2</sup> *Ante*, law of (October) 1705, c. 23. Very probably the remark of the Attorney-general, in *Smith v. Brown and Cooper*, (*ante*, p. 183,) which was of Easter term, 1708, had reference to this law; and, possibly, the distinction which Lord Stowell, in 2 Hagg. Ad. R. p. 114, proposed to recognize in such international cases between *domestic* slaves and *field* slaves, may have been suggested by a perusal of this statute.

<sup>3</sup> *Ante*, law of Va. 1657–8, c. 46; Md. 1715, c. 15, *Chinn v. Respass*, 1 Monroe's R. 25, 26.

<sup>4</sup> 2 Hildr. 419. "The harsh slave laws in force in the more southern colonies were unknown, however, in New England. Slaves were regarded [1750] as possessing the same legal rights as apprentices, and masters, for abuse of their authority, were liable to indictment." See also *Winchendon v. Hatfield*, 4 Mass. R. 127, *ante*, the note after *Laws of Mass.* in ch. vi. Reeves' *Domestic Relations*, 340, so far as his description of slavery in Connecticut may relate to the colonial era.

right of the master, in respect to such slave, be thereafter maintained in other jurisdictions of the empire as a right resting on the common law of England, having, as to such master, personal extent throughout the empire.<sup>1</sup>

b. Nor could the master's right be thereafter recognized under the law of transit, as property.<sup>1</sup>

§ 285. And further, admitting the legal character of slavery to have remained unchanged in the place of domicil, and that there had been a time, during the planting of the colonies, when the slave condition of negroes and Indians domiciled in some one colony should properly have received international recognition in every other part of the empire, as being the effect of universal jurisprudence—the *law of nations*—yet this law is, in its nature, always liable to change.<sup>2</sup> It may have changed during the colonial period, in respect to the slavery of Africans and Indians, as it had before changed in respect to the personal condition of persons of other races.<sup>3</sup> If then it were true as matter of historical fact that this law or jurisprudence, gathered from the laws and customs of those nations whose juridical action is the source of that law, had so changed, no tribunal of any one nation, nor of any several jurisdiction of the British empire, would thereafter have had the same judicial reason for supposing the slave-condition of an alien person of one of those races, entering into its jurisdiction, to be recognized by the supreme civil power, whose will it should apply as law ; the reason, namely, that it was to be considered the result of a law having universal recognition, and which presumptively constituted a portion of the municipal (national) law of the forum.

§ 286. The question whether any rule or doctrine of the *law of nations*, universal jurisprudence, has, during any period of time, continued unaltered, is a question of fact.<sup>4</sup> The doctrines

<sup>1</sup> *Ante*, §§ 243, 244.

<sup>2</sup> *Ante*, § 272.

<sup>3</sup> *Ante*, § 39.

<sup>4</sup> *Ante*, §§ 162, 163, 167.

<sup>5</sup> In attributing any legal rule to the universal jurisprudence, the *jus gentium* of any particular period, it will be perceived that no change of that law can be simultaneous among those nations which are the sources of that law. The tribunal of any

of that law, at any particular time, are judicially known from the juridical action of all civilized nations ; distinguishing such principles as are received in all foreign jurisdictions, or allowed to have personal extent without reference to territorial limits. And though certain legal effects (rights and obligations) should be found to exist under the juridical action of many or all civilized nations, yet, if under that action they are commonly limited to specific localities, they are not attributable to universal jurisprudence.<sup>1</sup> Though slavery may, by some European powers, have been maintained in their American possessions, yet, if its incidental rights and obligations were disallowed by them in Europe, it was then judicially known as a result of a local law, *jus proprium*, only, and no longer ascribed to the *jus gentium*, universal jurisprudence.

Now, leaving out of view, for the present, the juridical action of the British empire or of any several political part of it, the authorities already cited in the last chapter may alone prove that the *law of nations*, in respect to slavery, had changed during the colonial period ; that change being shown by the judicial attribution, in European states, of personal liberty to Moors, negroes, and Indians, without regard to their legal condition in a foreign domicil ; even, in some instances, where that domicil was a colony under the same political dominion as the forum of jurisdiction.

§ 287. Therefore, even if the authorities referred to did not, as precedents of customary private international law,<sup>2</sup> establish a rule judicially applicable in like cases by the tribunals of the several jurisdictions of the British empire, yet, in determining

one state, when seeking the doctrine of the *law of nations*, the exposition of universal jurisprudence, must look to the additive verdict of many national authorities in their municipal (internal) and international law, expressed by legislation or judicial decision. And though, comparing century with century, it may be unhesitatingly declared that the doctrine of that law has changed on some particular point, yet it may be impossible to indicate the exact time at which that change should have been first recognized. This act of discrimination is in its nature autonomic on the part of the tribunal.

There can be little doubt that there was once a period when to kill or sell one's children was a paternal power or right recognized among all nations. (Comp Bynkershoek's Essay on this right under the Roman law.) Abraham, proposing to slay his son, obeyed a command higher than human laws ; but it is not unlikely that his power to do so was admitted by the jurisprudence of those among whom he lived.

<sup>1</sup> *Ante*, §§ 99-102.

<sup>2</sup> *Ante*, § 258.

the international recognition of slavery, they were evidence of what was or was not judicially receivable as an effect of universal jurisprudence. So that, supposing slavery to have remained the same *chattel* condition in the colonies, under their local laws, it could no longer be said to be a *constitution of the law of nations*, in the sense of a legal effect known by its actual prevalence among all nations or all enlightened nations. The condition of a negro who had been a slave in the place of his domicil could not then be judicially supported in any forum of jurisdiction *upon this ground*, after this change in universal jurisprudence had actually taken place.

§ 288. *a.* Contemporaneously with the occurrence of this change in the *law of nations*, the master's right of ownership ceased to be supported by the common law of England, embracing the *law of nations*, and having as to him a personal extent throughout the empire.<sup>1</sup>

*b.* The same change would in like manner, whenever it occurred, have limited the effect of the international rule of transit as a protection of the right of masters in slaves whom they should, though for a temporary purpose, bring with them within the limits of any part of the empire wherein slavery was not allowed by the internal law.<sup>2</sup>

§ 289. In a jurisdiction wherein negro slavery had been introduced under the old *law of nations* and wherein it has continued to have essentially the same chattel characteristics, there, the condition might have, or in the jurisprudence of that state it might have the same legal character as before, and be still recognized to be one of those effects of law which are received as deductions from *a priori* principles and taken to accord with natural reason, whether the right and obligation in which such effect consists are ascribed to temporary or to domiciled subjects. And as between two jurisdictions, in each of which slavery retained its essentially chattel character, it may be that, as to them, or in the judicial apprehension of their several courts, it should still be ascribed to universal jurisprudence though it should have been abandoned

<sup>1</sup> *Ante*, §§ 244, 245.

<sup>2</sup> *Ante*, § 272.

and forbidden by all other nations. In such jurisdictions the tribunals of either should have recognized the slave condition of an African introduced from the other, or from elsewhere, in the same manner as they recognized the local slavery. There would be, as between any two such jurisdictions, no conflict of laws and no question of the comity of nations.

§ 290. But further—the judicial allowance of certain legal effects as created by a rule of universal jurisprudence is based upon the assumption that universal jurisprudence—the historical *law of nations*—is an exposition of natural reason adopted by the sovereign source of law in the forum.<sup>1</sup> Yet it is at the same time fully understood that the state, or the possessor of sovereign political power, is, in its estimate of the requirements of natural reason, entirely independent of the juridical action of similar states or persons. And it is always the duty of the tribunal rather to look for a part of the national common law as being the state's conception of a universal jurisprudence, than to receive it as gathered from the laws of foreign states.<sup>2</sup> The conjuncture is barely supposable that, at some given point of time, there should not be any domiciled inhabitants sustaining a certain relation attributable to the *law of nations* as then judicially cognizable: or, in other words, that a received principle of the *law of nations* should not be actually operative in the internal law. The fact that, at a certain time, there were no slaves among the domiciled inhabitants, might be accidental. Slaves might never have been imported; or all slaves may have been exported, or have been manumitted by their owners, or have deceased. It might even be that slavery had, as the condition of a domiciled inhabitant, been declared unlawful or been prohibited. And yet it might be that the *law of nations* sustaining slavery should still be judicially received as part of the municipal (national) law, to maintain the slavery of persons whether coming from other jurisdictions, to reside, or being transitory subjects.<sup>3</sup>

But if any effect attributable to a rule of the *law of nations*

<sup>1</sup> *Ante*, § 94.

<sup>2</sup> *Ante*, § 173.

<sup>3</sup> *Ante*, § 95.



has been repudiated in the internal law of the forum *as contrary to natural reason*, the whole basis for the judicial recognition of that rule in the private international law of the forum would be destroyed. And this would be the case whether the rejection of such effect, *on this ground*, had been made in a legislative or a judicial exposition of positive law.

§ 291. The English cases cited in the fourth chapter show that at a period shortly before the war of revolution no *domiciled* inhabitant of the British islands could be held therein as a slave or in any condition of involuntary servitude not based upon local customary and feudal law. It appears too that a similar judicial declaration of law had been made in Massachusetts about the same period. This juridical action would then, in these jurisdictions, have prevented any subsequent judicial recognition of the slavery of an alien on the ground of its being supported in the private international law of the forum by the historical *law of nations*; even if that law, as learned from the action of foreign states, had remained unchanged.

§ 292. Still, so long as the *law of nations*, or universal jurisprudence, remained the same in judicial recognition, and had not been repudiated *in the common law of England*, the right of the owner, being a British subject, in a negro chattel slave, would still have continued in any one jurisdiction of the Empire, even although in that jurisdiction slavery had been repudiated in the local or *internal* law, (*i. e.* the law applying to *domiciled* persons,) as contrary to natural reason, in the manner supposed in the last section. Thus in Massachusetts, at the time spoken of, it might have been supported by the "common law of England;" thus having a *quasi*-international operation, although the private international law of Massachusetts (being part of that law which rested for its *authority* exclusively on the juridical power of *that colony*) should not have sustained it.

But since the operation of the *law of nations*, in this instance, depended altogether upon its being contemporaneously received in the common law of *England*, there was a point of time, towards the close of the colonial period, when slavery could not have been supported in other parts of the empire *on this*

**ground** ; not even if the juridical action of other nations had not modified the old law of slavery once attributed to universal jurisprudence.

§ 293. It appears then, that—

1st. If the status of the alien in the place of his domicile was not that *chatte'* condition, which had been the only condition of bondage recognized by universal jurisprudence—the law of nations :—Or,

2d. If this law, as known in the juridical action of civilized states, had changed :—Or,

3d. If, as may have been the case in the British islands and Massachusetts, slavery was disallowed in the internal law as *contrary to natural reason* ;

— the involuntary servitude of negroes introduced from other jurisdictions of the empire or from abroad could not have been judicially recognized under the rule of private international law whose operation has herein been considered—the rule which requires the judicial recognition of rights and duties derived from a rule having the character of universal jurisprudence. In no one of these three cases could the slavery of the alien be considered a condition presumptively recognized by the supreme power of the forum as accordant with natural reason, or the result of a law having universal extent and received into the municipal (national) law (*i. e.* both the internal and the international private law) of the forum.<sup>1</sup>

4th. And when, on the contingency of one or more of these cases, the rights and obligations incident to the relation of master and slave should have ceased to be internationally cognizable under an application of this rule ; or, certainly, whenever, *in England*, those rights and obligations were not maintainable under this rule ; the right of the owner would cease to be cognizable as a common law right, supported by the law of national extent.

5th. Nor, on the same contingency, would those rights and obligations be any longer maintainable by the international rule of *transit*.<sup>2</sup>

<sup>1</sup> *Ante*, § 279.

<sup>2</sup> *Ante*, § 272.

§ 294. Supposing then that, by the occurrence of these contingencies, this was the doctrine applicable in some one jurisdiction of the empire, and also that the question had arisen for the first time, or that there was no local precedent or customary law directly applicable to such cases, the only international rule which could maintain the condition of the alien negro or Indian, who should be claimed as a slave under the law of his domicile, would be that part of the customary law which is called *comity*.

This rule, as has been argued in the second chapter, would support the condition of an alien existing under the law of his domicile if not inconsistent with principles in the local law judicially taken to have universal personal extent.<sup>1</sup>

§ 295. In attempting, in the second chapter, to state a general rule for distinguishing what principles in the local or territorial law of any one jurisdiction may be taken by its tribunals to have universal personal extent, it was supposed that such extent might be known from, either,

1. An act of positive legislation, declaring such principle to have universal personal application so far as the dominion and jurisdiction of the legislating sovereign may extend, or,

2. From the judicial attribution, to natural persons domiciled within the supposed jurisdiction, of rights or duties (resulting from such principle) as being antecedent to rules of action ; or, to change the phraseology, as resulting from law in the secondary sense of the term—a condition of existence—or from the natural law, in the only sense in which it can, in jurisprudence, be distinguished from positive law.<sup>2</sup>

§ 296. From the view given in the preceding chapters of the establishment of municipal law in the colonies, it would appear that neither these rights, which were known as common law liberties, nor any rights inconsistent with a condition of bondage or even of chattel slavery, were ever in any colony attributed to all natural persons by any act of *positive legislation*. And it may be assumed that there was no English statute enacted in and for the British isles, during the colonial period, which altered

<sup>1</sup> *Ante*, §§ 88, 110.

<sup>2</sup> *Ante*, §§ 102, 114–116.

the extent of the former customary or common law of status or condition.

§ 297. And if, in some one several jurisdiction of the empire, all domiciled inhabitants had become freemen by a judicial declaration that *all such* were entitled to individual rights, as known to the common law—the liberty of free English subjects—yet it might have been a usurpation of juridical power, in a tribunal, to have made this law of personal liberty so universal in extent as to limit the rule of comity in these cases.

A former international recognition of any particular relation between persons, by the tribunals of the forum, becomes for later tribunals a precedent of private international law. In the colonies wherein domiciled negroes were held in slavery the international recognition of the condition of alien slaves, after the time when it is supposed the *law of nations*—universal jurisprudence—would no longer have been applicable,<sup>1</sup> may in fact be ascribed to the customary law of those jurisdictions as much as to comity; which is indeed itself part of the customary law, and which, it is here supposed, might have caused the international recognition of slavery, though no precedents of the same forum, occurring in like circumstances, could be found.

§ 298. If then, in the British islands, at the date of Somerset's case, and in Massachusetts, at some time before the Revolution, negroes could not be held in servitude under the local or internal law; or if, changing the form of expression, no domiciled negro or Indian could have been there retained in such servitude, it might perhaps still have been claimed that the former international practice would support in those jurisdictions a continued international recognition of the slavery (chat-tel or personal) of negroes domiciled elsewhere; at least until positive legislation had either altered that practice or had expressly given a universal personal extent to the law of free condition.

Supposing then that, in the other colonies, the claim of an alien master would have been supported by the rule of comity

<sup>1</sup> *Ante*, §§ 286, 289.

(to say nothing of other customary law) the question arising on such claim may be examined for the colony of Massachusetts and the British islands.

§ 299. It has been observed already in this chapter, that, in some of the colonies, negroes and Indians, though held in a condition which, for want of a more accurate term, may be called *absolute* slavery, may still, at least if converted or baptized, have been regarded as legal persons and not chattels. From the phraseology of legislative acts in the New England colonies, which had something of the nature of bills of rights, and from the judicial application of customary law therein, so far as it can be known, it may be inferred that, in those colonies, the possession of legal personality was ascribed to law in the secondary sense—a condition of things—and was held to belong to all natural persons as an incident of humanity. Though, while heathen negroes continued to be introduced from abroad as chattels by the *law of nations*, the attribution of personality was universal only in respect to nominally Christian persons. The same may be taken to have been the law of the British islands shortly before the date of Somerset's case, even if it is admitted that negroes nominally Christian could there have been lawfully retained in involuntary servitude at that time.<sup>1</sup>

On the principle herein assumed to be applicable, this attribution of legal personality in these jurisdictions, supposing it to have been thus made universal, should have limited that recognition, by comity, of the condition, under the law of their domicil, of negroes entering from other countries or parts of the empire; if in such domicil it had been *chattel* slavery.

§ 300. It has been shown that in one important respect slavery had changed its *character* in every colony before the Revolution. That is to say—the slavery of negroes, at least of those born on the soil and nominally Christian, lost its foundation in universal jurisprudence—the *law of nations*—and became an effect of local law—*jus proprium*.<sup>2</sup> But it is at the same time true that the condition of slavery, as characterized by cer-

<sup>1</sup> *Ante*, § 188.

<sup>2</sup> *Ante*, § 215.

tain obligations of the slave and the correlative rights of the owner, did not essentially vary, whether the status thus resting on local law was legally distinguishable as chattel slavery or as the condition of a legal person.<sup>1</sup> In fact, even though in some several jurisdiction of the empire personality should have been thus universally attributed, yet while domiciled negroes could, notwithstanding, be held there in servitude, as persons, the tribunals might reasonably suppose the condition of alien negroes, under the contemporary law of their domicil, to be equally the condition of a legal person. So that its recognition in that forum under the rule of comity, would not be less consistent with a universal attribution of personality than was the local slavery.

Therefore, although, strictly speaking, the attribution of personality involves the attribution of some individual rights, it may be assumed here that the attribution of personal liberty, whose universality should have prevented the judicial recognition, by comity, of a status of bondage created under a foreign law, should have been one more absolute than that involved in the attribution of legal personality only.

§ 301. When it is intimated that a condition of involuntary servitude may be inconsistent with the attribution of individual rights, under a principle having universal extent in some one forum of jurisdiction, it is at the same time confessed that, as human society is at present constituted, no state or country can be supposed to exist wherein personal freedom is a right actually enjoyed by every individual under the internal law.

Yet it is possible that the right should be attributed by that law to every individual, except as limited by certain legal relations ; such as relations essential to the existence of families, and by the effects of remedial and punitive law ; and that other limitations of that right under the local law should have especial reference to local peculiarities. In a state wherein this should be the case, individual rights might be attributed to all to such a degree as to preclude the judicial recognition of conditions or status inconsistent with the exercise of those rights.

<sup>1</sup> 12 Conn. R. 59. *Jackson v. Bullock*, p. 59.

§ 302. If then the courts in Massachusetts or in the British islands could have held the individual rights attributed to Englishmen to be incidents of a relation existing independently of rules of action enforced by positive law, and that those rights were actually incident to the condition of all domiciled persons, except as limited by the family rights and duties, punitive and remedial laws, or in relations whose jural character depended on local circumstances, under special exceptions by statute or customary law, they might (under the second index of universality, *ante*, § 295,) have considered liberty to be so universally attributed, by the sovereign power whose will they were to apply as law, as to prevent the international allowance of slavery under the rule of comity.

§ 303. In Massachusetts this could hardly have been maintained if the refusal of the provincial governors to co-operate with the local legislature in prohibiting the importation of African slaves, was a sufficient proof that such importation was lawful. That of itself might have been inconsistent with a universal attribution of liberty, whatever may have been the condition of those so imported after they had become domiciled or had been purchased by residents. In the cases wherein domiciled negroes had been declared freemen, the judgment of the courts, according to Dr. Belknap's account, had been only that negroes born in the colony, or only perhaps that domiciled negroes were entitled by the charters to the rights of the English colonists.<sup>1</sup> It might perhaps, however, have been held that personal liberty was to be attributed to all baptized negroes and Indians.

§ 304. Of the many slaves actually held in England, at the time of Somerset's case, a large proportion may be supposed to have been imported from Africa, and to have had no other domicile than England. The importation of slaves into the British islands had no implied sanction in the failure of an attempt to pass a statute against it,<sup>2</sup> as in Massachusetts; but,

<sup>1</sup> *Ante*, p. 264, note.

<sup>2</sup> A bill for restricting the slave trade was first brought into the House of Commons in 1788. The final act for its abolition was in 1807. *Walsh's Appeal*, pp. 344-350.



has been shown in the fourth chapter, the same reasoning which supported the importation of slaves into an American colony would, apparently, have justified their importation into England : unless the law which, in England, determined the condition of the native Briton extended to all persons within the realm of England. But Lord Mansfield must be taken to have based his decision on the universal personal extent, at the time, of this law of condition ; and to have held that any exceptions under the territorial law, such as villenage and the bond-slavery of colliers and salters in Scotland, then existing,<sup>1</sup> were jural or rightful only in reference to peculiar local circumstances. Such a meaning, it would seem, will best vindicate the juridical fitness of his language when he said, "The state of slavery is of such a nature that it is incapable of being introduced on any reasons moral or political ; but only by positive law, which preserves its force long after the reasons, occasion, and time itself, from whence it was created, is erased from memory. It is so odious that nothing can be suffered to support it but positive law."

§ 305. It has already been shown that, in this distinction of certain principles contained in the municipal (national) law of a country as having universal personal extent, a tribunal distinguishes some rules as jural or rightful only in and for a certain territorial jurisdiction, and others as jural because consonant with the conditions of man's existence in society ; thus recognizing a *natural law* in the only sense in which it is known in jurisprudence or the science of positive law.<sup>2</sup> The legislator may determine this by exercise of autonomic power. A tribunal, in making this distinction, can only refer (in the want of local precedents or legislation determining the extent of law) to the juridical action of foreign states : especially in their application of international law ; through which it is ascertained what principles of its own (national, civil,) law each state holds to be natural and universal, and what others peculiar (*proprium*) to itself or its own peculiar circumstances. And by this refer-

<sup>1</sup> *Ante*, p. 332, note.

*Ante*, §§ 87, 97, 100.

ence the science of *universal* jurisprudence (*jus gentium*) becomes manifested.

§ 306. It being then admitted that in England, at this time, no right similar to that claimed by the master in *Somerset's* case could there be exercised in reference to a domiciled inhabitant, or that no such obligations as those incident to slavery in the colonies could be enforced in England by the territorial or local law against a domiciled inhabitant, the courts there could have referred to the international practice of foreign countries in similar circumstances ; that is, countries wherein such rights and obligations could not be enforced as between domiciled inhabitants or under the internal law. They would have regarded such practice not only as the evidence of a customary rule of international law supposed to be received into the law of the land,<sup>1</sup> and also as showing whether universal jurisprudence—the *law of nations*—did or did not sustain such rights and obligations,<sup>2</sup> but also as showing whether the general law of free condition, having a territorial extent in the forum of jurisdiction (England) was to be taken to be jural with reference to domiciled subjects only, or to have universal personal extent, with only such exceptions as were to be considered necessary in reference to local circumstances ; as shown by statute or by particular customs.

§ 307. Now the European continental authorities already cited may, regarded in this light, be taken to show that—when in any country that condition of bondage which has herein been called absolute or chattel slavery, has become unknown to the territorial or internal law, or when it cannot exist as the condition of a domiciled inhabitant, all limitations to the enjoyment of individual rights under that law, (if not incidents of the family state or effects of punitive laws,) are to be considered jural only in reference to local and exceptional circumstances sanctioned by statute or particular local customs, and that the ordinary or general law,<sup>3</sup> attributing individual rights to the domiciled inhabitants, is one which is to be taken (with these excep-

<sup>1</sup> *Ante*, §§ 122, 255.

<sup>2</sup> *Ante*, § 261.

<sup>3</sup> *Ante*, p. 181, n. 2.

tions) to have universal personal extent, or to apply to all natural persons within the territorial domain. So that a tribunal cannot look upon the rights and obligations of aliens, existing under a foreign law, if inconsistent with the possession of those rights, as equally recognized exceptions to that general law. And that therefore, in such forum, the rule of *comity* cannot take effect in sustaining the involuntary servitude of an alien as incident to a status existent by the law of his domicile.

These authorities are earlier than Somerset's case, and the application of the doctrine above stated would have prevented the judicial recognition of his slave condition under the rule of *comity*.

§ 308. It is thus supposed that Lord Mansfield's decision in the case of Somerset was justified by the system of private international law derived from the customary jurisprudence of all nations, applied in a case of the so called "conflict of laws" in three different forms :

1. The rule derived from the international practice of nations in like cases disallowed the master's claim.

2. The *law of nations*—universal jurisprudence, as learned from the international practice of nations, no longer supported the slave condition of the negro.

3. The juridical action of foreign nations, as indicating what principles of the law of England were to be taken to have universal personal extent, required a universal extent for the law of free condition applying to the domiciled inhabitants, and therefore the rights of the owner and the obligations of the slave were not supported by *comity*.<sup>1</sup>

<sup>1</sup> Mr. Justice Campbell, in Dred Scott's case, 19 Howard, 495, says : "It will be conceded, that in countries where no law or regulation prevails, opposed to the existence and consequences of slavery, persons who are born in that condition in a foreign state would not be liberated by the accident of their introgression." If it is meant that the liberation will not ensue where there is no statutory prohibition of slavery, the concession here assumed seems to be very much out of use. It was not required by the rules of international private law a century ago, and has certainly not been more favored since that period. The "accident of introgression" liberated persons born in slavery in foreign states when the *law of nations*—universal jurisprudence—had changed. Mr. Justice Campbell adds : "The relation of domestic slavery is recognized in the law of nations, and the interference of the authorities of one state with the rights of a master belonging to another, without a valid cause, is a violation of that law. (Wheat. Law of Nat., 724 ; 5 Stats. at Large, 601 ; Calh. Sp. 378 ; Reports of the Com.

§ 309. According to the view of the public law of the British empire, during the colonial period, which has been given in the preceding chapters, the slavery of a negro inhabitant in any one of the colonies rested on a portion of supreme or sovereign power held severally by the local government. The several jurisdictions of the British empire were like independent national jurisdictions, in their international recognition of the status of negro slaves. This was the colonial theory of public law, which was confirmed or established by the revolution.

It must be noticed that the applicability of the argument here detailed as determining Somerset's case, rests wholly upon this doctrine. But on the theory of public law, determining the location of sovereign power over persons and things in the American colonies, which was held by Lord Mansfield, (as appears in this decision, and is known from other sources,)<sup>1</sup> there was a gross inconsistency in his refusing, as a judge, to give a *quasi*-international support in England to the condition of slavery, which he acknowledged to be lawful in the colony. For, even admitting that that condition did not, at that time, receive any support from the *law of nations*, i. e., universal jurisprudence, Lord Mansfield held, not only that Somerset was legally a slave in the colony, but that the law by which he was held as a slave rested upon the same supreme source of law upon which the territorial law of England depended for its coercive power in England, that is, parliament, or the crown and parliament. Of two laws, equally dependent on the juridical will of the sovereign in whose name he exercised the judicial functions, Lord Mansfield could not have taken one—the English (local) law of status—to have that universality or universal

U. S. and G., 187, 238, 241.") The *law of nations*,—universal jurisprudence,—ceased to support slavery long before Somerset's case; and if Judge Campbell means here *public international law*, a law binding on nations, the assertion is simply ridiculous: unless the slaveholding States of this Union can *alone* create a rule in that law. For, from the middle ages to the present day, every European state has claimed and exercised the power to recognize or not to recognize the bond status of strangers. And when nations have not allowed their own subjects to hold negroes in slavery, they have, almost without exception, rejected the claims of foreign owners voluntarily entering their dominions. Their *right* to do so has never been questioned.

<sup>1</sup> See his speech in the Lords, Feb. 7, 1775, in 2 Campbell's Lives of Ch. Justices, p. 496.

personal extent which would prevent the judicial recognition, under the rule of comity as explained in the second chapter,) of a right and obligation sanctioned by the other.

§ 310. In other words, since Lord Mansfield held that the sovereign whose juridical will had, in Virginia, (as by a jural rule, or rule of right,) made Somerset a slave, was identical with the sovereign whose juridical will (in a jural rule, or rule of right,) he was to enforce at Westminster, he could not (if Somerset had been a chattel in Virginia) say that the law of England, in attributing to Englishmen legal capacity for rights and duties, declared a natural law, or a law in the secondary sense, to be received and applied by him with universal personal extent or to all persons within the power or recognized territorial jurisdiction of the law of England; and so have refused international recognition of his chattel condition.<sup>1</sup> Nor (if Somerset had been, in Virginia, a legal person in bondage) could Lord Mansfield say that the law of England, attributing personal liberty to all domiciled or native subjects, was to be regarded as the recognition of, or the statement of, a law in the secondary sense, a natural law, and that that right was to be taken by him to be the incident of a state of things existing independently of rules of action established by the state, and one attributed to all persons within the territorial jurisdiction as by a law of universal extent, a law applying to all persons irrespectively of their domicil or their previous subjection to other laws or jurisdictions, and thus have refused international recognition of the relation between the master and slave, regarded as legal persons.<sup>2</sup>

§ 311. Indeed, since there was no statute or customary rule that the colonial slavery should not be recognized in the British islands, it followed, from the assumption that they and the American colonies were under the same sovereign source of law, that an English tribunal administering law as the ascertained will of that supreme power, was bound to recognize the law of slavery as a personal law, according to the *quasi*-international

<sup>1</sup> See *ante*, p. 106.

<sup>2</sup> See *ante*, p. 108.

rule for the recognition of personal laws which was stated in the second chapter.<sup>1</sup> That is to say, while the domicile of the slave and his master remained unchanged, every tribunal representing that source of law, in any part of the empire, was bound to recognize within its particular forum the relation, created by the colonial law, as jural and legal ; independently of its connection with the *law of nations*—universal jurisprudence—and independently of the rule of comity, which properly obtains only as between independent states.<sup>2</sup> It was, so to speak, stultifying the jurisprudence of England, for a judge adopting Lord Mansfield's theory of the public law of the empire, to declare that the relation between the master and slave was unlawful in England, *because contrary* to natural justice, and at the same time to admit that it was a legal relation in the colony.<sup>3</sup> For, in the colony, that relation had been established by a judicial application of natural reason by tribunals representing there, on his theory, the same juridical sovereign whom the King's Bench represented in England. Lord Mansfield in this decision ignored the historical origin of negro slavery, when he declared it to rest upon statutes having a definite territorial extent in and for the plantations and the coast of Africa ; though the essential inconsistencies in his "opinion" would not thereby have been removed.<sup>4</sup>

<sup>1</sup> *Ante*, p. 100, and notes.

<sup>2</sup> Comp. the argument of Tribaud, for the master, in the French case, 13 Can. Cel. The criticisms of the English editors, in 20 Howell's St. Tr., p. 15, *note*, upon this argument, are unfair. It is fully as logical an exposition of that side of the general question as is Hargrave's upon the other.

<sup>3</sup> Very similar is Lord Stowell's observation, 2 Hagg. Adm. R., pp. 114, 127.

Montesquieu, *Lettres Persanes*, Lettre 76. "Il y a long temps que les princes Chrétiens affranchirent tous les esclaves de leurs états ; parceque, disoient ils, le Christianisme rend tous les hommes égaux. Il est vrai que cet acte de religion leur étoit très utile ; ils abaissoient par là les seigneurs, de la puissance desquels ils reliroient le bas peuple. Ils ont ensuite fait des conquêtes dans les pays où ils ont vu qu'il leur étoit avantageux d'avoir des esclaves, ils ont permis d'en acheter et d'en vendre, oubliant ce principe de religion qui les touchoit tant. Que veux-tu que je te dise ? Verité dans un temps, erreur dans un autre."

During the American war, the slaves in Virginia and Carolina were regarded by the English as property and objects of booty. It was estimated that not less than thirty thousand were carried off from Virginia. The policy adopted by Dunmore at the beginning of the war, was to arm the slaves against their masters, but this was not persevered in. 3 Hildr., 355.

<sup>4</sup> Mr. Sumner, in a speech in the Senate of the United States, August, 26, 1852, said that Lord Mansfield pronounced this decree "with discreditable reluctance, sully-

§ 312. According to the principles herein before assumed, the true statement of the international law involved in Somerset's case<sup>1</sup> is this :—The *law of nations*—universal jurisprudence—as then recognized by European states, did not support his bond condition, whether it was chattel slavery or the bondage of a legal person. This condition had been created by the local law, *jus proprium*, of the colony in which he had been a domiciled inhabitant ; whether he had there been held as a chattel, or as a person bound to service or labor, was immaterial. The law of the foreign jurisdiction—the colony—was to be taken to be *jural*—a law of right—in and for the colony : its consequences there were legal. But the law of England (except as comprehending the *law of nations*—universal jurisprudence—if it then supported the slavery of *heathen* negroes<sup>2</sup>) attributed the right of personal liberty to all natural persons within its territorial jurisdiction, and enforced no dominion of one private person over another, except in the relations of the family, relations arising out of primitive and remedial law, and in some local districts, certain relations founded on particular customary law. No relation of this kind existed between Somerset and his master. The law which attributed the so-called “personal rights” to the inhabitants of English birth (except as modified by these relations) had a universal personal extent in *England*, which prevented the operation of the principle of

ing his great judicial name, but in trembling obedience to the genius of the British constitution.” This is hardly grateful. Even if the decision was good law, Lord Mansfield was unable to give good judicial reasons for it, and might well have been reluctant openly to assume the province of legislation, as, from his opinion and observations during the argument, he evidently thought himself obliged to do. It seems likely that his “trembling obedience” was rendered more to the then prevailing current of public opinion, (see Dunning's remark, Lofft's R., pp. 9, 10,) than to a sense of judicial responsibility.

That is a doubtful compliment, by Best, Ch. J., in *Forbes v. Cochran*, 2 B. & C., 470, saying that the judges (in Somerset's case) “were above the age in which they lived,” &c.

Lord Mansfield, encouraging a general officer who was doubting his own competency for the judicial duties incident to the office of governor in a W. I. colony to which he had been appointed, told him it would be easy to decide justly—“but never give your reasons, for your judgment will probably be right, but your reasons will certainly be wrong.” Campbell's *Lives of the Chief Justices*, vol. II., p. 572.

<sup>1</sup> The law applying as municipal (internal) law has been stated, *ante*, § 189.

<sup>2</sup> The name *James Somerset* makes it probable that he was a baptized or nominally *Christian* negro, though the return to the writ states that he was a native African.



comity, since there was no statute or international custom by which these general principles could be limited.<sup>1</sup>

§ 313. This statement of the operation of international private law in this case, is based upon the assumption that negroes could not be at that time held in slavery under the internal law ; that is, that no negro domiciled in England could then be held in slavery. It was, indeed, Lord Mansfield's decision of the case which finally established this doctrine in the internal law, and thereby liberated, it has been supposed, a large number of negroes retained as slaves in England. But, according to the review of the cases which was given in the fourth chapter, there was no principle on which a domiciled negro could be thus held in involuntary servitude.

In the claim of ownership in England, whether under the internal or the international private law, the principal reliance seems to have been on an alleged general custom ; meaning the then customary popular recognition in England of the relation of master and slave. It was upon this ground that Lord Stowell objected to this decision, saying that, from the time of the establishment of slavery in the colonies, negroes had been bought and sold in London and had been sent back thence to the plantations.

§ 314. But, in stating that during the two and twenty years previous "decisions" of great authority had been delivered supporting that "system" (*i. e.*, that practice) in England, Lord Stowell certainly asserted more than judicial history warranted. It has herein throughout been supposed that there was law to

<sup>1</sup> Burge, 1 Comm., p. 741, says, respecting Somerset's and the Scotch case: "The principle established by these decisions rests on grounds which are indisputable. A status which, like slavery, was the creature of municipal regulation alone, could have no existence in a country where that regulation not only had no force, but was at variance with the law of that country." By "municipal regulation" the author here intends positive legislative enactment, and illustrates the common misapprehension of the legal foundation of slavery. It appears to have been a very doubtful question whether, at this time, slavery was at variance with the law of England and Scotland.

Mr. Hargrave's argument with copious notes of various authorities bearing on the question, was published at length in vol. 11. of his State Trials, and afterwards in 20 Howell's State Trials. In this form it has justly been referred to as an impartial treatise. It is, however, liable to the same criticism with all the English arguments and decisions in these cases; that is, that no definite principles of international jurisprudence are enunciated; and the undetermined use of the terms *positive law*, *natural law*, *municipal law*, *law of nations*, &c., deprives it of proper argumentative consistency. Compare *ante*, p. 109 note.

maintain in England the right of property, as of *chattels*, in a heathen negro slave,<sup>1</sup> but that after conversion there was no law having the character of universal jurisprudence and no *jus proprium* (unless this same *practice*) to continue that right. After such conversion the courts would have been called to decide the same question, in and for England, which, it has been supposed, the colonial courts were once called to decide for their several jurisdictions ; i. e., what was the status which existed after the conversion.<sup>2</sup> Now it seems that, before this case, the weight of judicial decision had been that negroes were not *chattels* in England ; and though there was a prevalent juristical opinion that the relation of master and servant continued ;<sup>3</sup> that the obligation of the servant was for life and might be assigned as property, it was nevertheless a mooted question and not received in the courts as a settled point ; some judges having positively denied the existence of any such relation. And from all that appears, this may have been the first occasion on which a judicial tribunal had been obliged to decide, in a controversy between the master and slave, whether such a right of private dominion and correlative obligation could be maintained in England.

§ 315. The practice which was relied on was then the holding in servitude legal persons, and so to be distinguished from chattel slavery under the *law of nations*, which had been recognized in the custom of merchants and the common law of England. For that customary law maintained the right of the master only as a right to a chattel and while the negro was heathen. Now a change of religious belief, unless marked by the ceremony of public baptism, could not have been matter of public notoriety, and there is reason to suppose that for this reason the administration of baptism was often withheld when

<sup>1</sup> Blackstone, 1 Comm., 425, denied that any discrimination between persons, in respect to personal rights, according to their faith, could be recognized in English law.

<sup>2</sup> *Ante*, §§ 178, 204.

<sup>3</sup> Molloy, *De Jure Maritimo*, B. 3, c. 1, § 8. See Blackstone's contradictory statement, 1 Comm., 424. *Chamberlayne v. Harvey*, *ante*, p. 182,—“ he is no other than a slavish servant.”

it would have been otherwise proper.<sup>1</sup> And the majority of negroes imported into England were probably not distinguishable as either Christian or heathen. A large proportion may be supposed to have voluntarily<sup>2</sup> continued in the service of their former owners, and, except in the sales which may have taken place, the enforced character of their service had no public recognition.<sup>3</sup> The sales were probably confined to London and the larger seaport towns. To say nothing then of the want of judicial recognitions of such a servitude, and nothing of judicial dicta against its existence, the practice of holding in bondage negroes, who were not known in law as *chattels*, had not that general publicity, definite character and general recognition which must characterize custom if it is to be held for common law.<sup>4</sup>

Negro slaves could hardly have been brought into England before the middle of the seventeenth century. The practice of detaining christianized negroes in servitude there had not then the characteristic requisites of either general or particular custom.<sup>5</sup>

There are, too, some cases in which judicial tribunals may

<sup>1</sup> Observations of Lord Mansfield, *Lofft's R.*, p. 8.

<sup>2</sup> Even though they received no wages, and therefore they might not be able to recover any thing for their service on a *quantum meruit*; see *Alfred v. Marquis of Fitzjames*, 3 Espinasse, p. 3. (Easter, 39 Geo. III.)

<sup>3</sup> That negroes were sometimes sold in London, *in corpore*, appears from advertisements in the papers of that day. (Senator Sumner's Speech, Senate, Aug. 26, 1852.) The sales, at London, of negroes then in the Plantations on the estates to which they belonged, which were probably of frequent occurrence, were not instances of the custom which is now under consideration. Such sales were made there after this decision, as sales of negroes, being in foreign slaveholding territories, may still be made.

<sup>4</sup> See *ante*, § 31 and notes. Lindley's Thibaut, Appendix, xiii-xvi. The custom, so far as it existed, may also in part be ascribed to ignorance of their rights on the part of the slaves. This could not perhaps have been considered under the stern rule of English law. The Roman law admitted the plea of ignorance of law in certain cases. "It was a valid plea to minors, women, soldiers, (propter rusticitatem,) to all who were beyond the reach of legal advice and information."—J. G. Phillimore's Principles, &c., p. 97.

<sup>5</sup> "Customs which are opposed to written law (*correctoriæ*, *derogatoriæ*) are held by the Roman jurists to be invalid, unless they have been specially confirmed by the supreme power of the state, or have existed immemorially: and it is immaterial whether they consist in mere non-observance of the written law (*desuetudo*) or in the observance of new principles opposed to such law, (*consuetudines abrogatoriæ*;) and it is also immaterial whether the customs have or have not been confirmed by judicial decisions." Thibaut, Lindley's Transl. § 17. But the author notes a great variety of opinion on these points. It might be said that in the great charters, the Bill of Rights, the Habeas Corpus Act, &c., the law attributing personal rights to the English subject in England, had become written or statute law.—1 Bl. Comm. 127, 128.

determine the validity of customs by a standard of reason.<sup>1</sup> But the nearest standard of this reason must be the established doctrines of law. The practice under consideration was not supported by universal jurisprudence. Its recognition was moreover contrary to the maxim of English law, which declared that in all cases, or in all doubtful cases, *liberty should be favored*.<sup>2</sup> Not having then the other marks of valid customary law, its character was to be judged by these jural standards which existed at its inception. So far then from being a coexistent part of common law, it was itself, in its beginning and continuance, contrary to law.

§ 316. It may be thought that, by the same argument, the colonial courts could not (as it was herein before supposed they might) have maintained in America the slavery of christianized Africans and Indians, independently of statute law.

But in the colonies the common law of England was not, as in England, a superior criterion of natural reason in judicial determination of the condition of *all* persons within the territorial forum of jurisdiction. In determining the condition of those to whom it did not have a personal extent, the law of England was only one among other indications of natural reason. It is, however, undeniable, that the same maxims in favor of personal liberty had had in Europe the character of universal jurispru-

<sup>1</sup> Consuetudinis ususque longævi non vilis auctoritas est, sed non usque adeo sui valitura momento, ut rationem vincat aut legem.—Cod. viii., tit. 58, *Quæ sit, &c.*, l. 2.

<sup>2</sup> "Humana natura in libertatis causa favorem semper magis quam in causis aliis deprecetur." Fortescue de Laudibus, c. 47. Coke Litt., fo. 124, b.; in § 193, Littleton, stating a rule in trying a claim of villenage, says,—*et ceo est in favorem libertatis*. Coke's note is—"It is commonly said that three things be favored in law: life, liberty, dower." And cites Fortescue, cap. 42. "Impius et crudelis judicandus est qui libertati non favet. Angliæ jura in omni casu libertati dant favorem." The whole passage in Fortescue is, "Crudelis necessario judicabitur lex, quæ servitutem augmentat et minuit libertatem. Nam pro eâ natura semper implorat humana. Quia, ab homine et provitio introducta est servitus. Sed libertas a Deo hominis est indita naturâ. Quare ipsa ab homine sublata semper redire gliscit, ut facit omne quod libertati naturali privatur. Quo ipse et crudelis judicandus est qui libertati non favet. Hæc considerantia Angliæ jura in omni casa libertati dant favorem." "The law favors liberty and the freedom of a man from imprisonment, and therefore kind interpretations shall be made in its behalf."—Wood's Institutes, c. 1, § 5, p. 25. "It is said the law of England is favorable to liberty; and so far this observation is just, that when we had men in a servile condition amongst us, the law took advantage even of neglects of the masters, to enfranchise the villein; and seemed for that purpose to subtilize a little, because our ancestors judged that freemen were the real support of the kingdom."—Burke's Accounts of European Settlements in America, vol. 2, p. 180.

dence, being expressed in the Roman law and received by all European states.<sup>1</sup> The only answer, perhaps, which can be given to this is that the European states which planted colonies in the new world by right of discovery, and there allowed the enslavement of the natives or promoted the introduction of African slaves, had, to a certain extent, modified the doctrine of universal jurisprudence in every determination of the relation of these races to the white colonist, and limited, to a certain extent, the personal extent of these principles in and for America. The colonial courts had, in this instance, more autonomous power than the European tribunals, and it is not necessary to suppose that natural reason applied judicially to the circumstances of the two races in America should produce the same effects as when applied to the situation of the same races in Europe.<sup>2</sup>

<sup>1</sup> By the earliest Roman law, xii. Tables, tab. vi. § 5, "In litigated cases the presumption shall always be on the side of the possessor, and in disputes about liberty or slavery, the presumption shall always be on the side of liberty."—Cooper's *Justinian*, Appendix I. *Causa libertatis non privata sed publica est.*—Dig. Lib. xl., tit. 5, l. 1. *Nemo enim prohibendus est libertati favere.*—Dig. Lib. xliii., tit. 29, § 3, l. 9. *Quæties dubia interpretatio libertatis est, secundum libertatem respondendum.*—Dig. Lib. l. tit. 17, leg. 20. *Libertas omnibus rebus favorabilior est.*—Ibid. l. 22.

<sup>2</sup> *Ante*, p. 80, note 2.

If the reader is unable to reconcile the action of these several judicatures, he can apply to either, at his discretion, the maxim—*Non omnium quæ a majoribus constituta sunt ratio reddi potest. Et ideo rationes eorum quæ constituuntur, inquirere non oportet, alioquin multa ex his quæ certa sunt subvertuntur.*—Dig. I. tit. 3, l. 22. And—*Communis error facit jus.*

## CHAPTER X.

OF THE PRIVATE INTERNATIONAL LAW DURING THE COLONIAL PERIOD.—THE SUBJECT CONTINUED.—OF DOCTRINES OF THIS LAW, APPLYING TO CASES OTHER THAN THOSE RESEMBLING SOMERSET'S CASE.

§ 317. Although the judicial tribunals of one or more nations, or of one or more parts of the British empire may, on the principles set forth in the preceding chapter, have refused to *maintain*, as between persons within their respective jurisdictions, the relation of master and slave *existing*<sup>1</sup> under the law of another country, there is no doubt that the same did recognize, or would have recognized the validity of the right of ownership as the effect of a jural rule, in and for the territorial limits of the foreign country. It would still have been consistent, in such tribunals, to have enforced contracts founded on the existence of that right of ownership, or to have enforced compensation for tortious acts interfering with its enjoyment in the foreign country or upon the high seas. There can be no doubt that the right in slave property was thus internationally recognized in every jurisdiction of the British empire during the colonial period, and, to the same extent, in European jurisdictions where slavery was unknown to the local law.<sup>2</sup>

<sup>1</sup> *Ante*, p. 59.

<sup>2</sup> Such partial recognition of slavery would, however, have been utterly inconsistent with the principle which Mansfield and the Scots Court of Session had proclaimed, and which Lord Robertson, in the same court, recognized in 1810, as the basis of their decision, when he said, "But there is another set of cases in which, also, the *lex loci* is disregarded; I mean those cases in which the *lex loci* is contrary to the general and universal rules of justice. This may be exemplified by the decision in the case of Knight, the negro, 15 January, 1770. His master bought him as a slave in

§ 318. The question of the condition of a person who may have returned to the jurisdiction or forum in which he had been held in slavery, after having been in a foreign country where that slavery was not recognized, or where he had been actually free, has usually been classed as a question of international private law. No cases presenting this question are on record as occurring before the separation of the colonies from the British empire. Gudelin *De Jure Novissimo*, lib. i. c. 4, 9,<sup>1</sup> seems to hold that slaves from Spain would not become absolutely free on reaching the Netherlands, and that they might be claimed if found afterwards in Spain, although the master could have no right over them while in the Netherlands. He appears also to refer only to fugitive slaves. “*Equidem arbitror servos Hispaniæ huc vel in Franciam venientes proprie ad libertatem non pervenire, quin repeti adhuc in Hispania, si postea ibi deprehendantur, in servitutem possint: verum in libertatem eos denegata, quamdiu hic sunt, adversus ipsos jurisdictione defendi. Non enim servi fugitivi recte comparabuntur illis, qui postliminio e manu hostium revertuntur. l. Requirendi, et passim C. de servis fugitivis, juncta l. Postliminium, D. De captivis et postlim. reversis; aut feris, quæ cum custodiam capientis evaserunt se in naturalem recepisse libertatem intelliguntur; § feræ igitur cum §§ seqq. Inst. De rerum divisione.*”<sup>2</sup>

§ 319. The argument here is merely that the situation of a slave who has got beyond the jurisdiction, in which he was by law a slave, is not analogous to that of the Roman citizen who, having been enslaved by the enemy, had escaped into Roman or friendly territory or been ransomed or recaptured, or to that of animals *feræ naturæ* which, being escaped from the first taker, become

Jamaica, where such purchases are legal. Neither the purchase nor the legality of it, according to the *lex loci*, were denied; but the court held that the dominion assumed over the negro under that law, *being in itself unjust*, could not be supported in this country to any extent, and judgment proceeding on the same principles was pronounced in England in the case of *Somerset*.” *Ferguson's Rep. on Divorce*, App. 396. Compare *ante*, p. 192, note, the quotation from Savigny.

<sup>1</sup> Noted by Groenewegen in a passage already cited, *ante*, p. 335.

<sup>2</sup> Christinaeus appears to have concurred in this opinion; compare *Christin. Decis.* vol. iv. lib. 7, tit. 36, decis. 80, n. 4. “*Ipse autem D. Gudelinus meus alias confrater in eodem consilio supremo, subdit se arbitrari servos,*” etc.



*res nullius*, and may be said to have regained whatever liberty they had before.<sup>1</sup>

But, in the modern international case supposed, the slave has not merely been out of the jurisdiction by whose law he had been a slave, but he has been within a jurisdiction by whose law he was declared free. There has been, in this case, a manumission as complete and competent in law as any which could be given by the master alone, for the master's act can derive force only from the juridical will of the sovereign power under which master and slave are living at the moment.<sup>2</sup> Now, since the effects of manumission are ascribed to universal jurisprudence, (manumissiones quoque juris gentium sunt,) it would seem that such emancipation of the slave by the law of the foreign jurisdiction was to be judicially recognized everywhere, in all jurisdictions into which he should afterwards pass, (unless there should therein be some *jus proprium*, customary or statute law, requiring a contrary judicial action,) even in that in which he had formerly been a slave.

This certainly would seem to have been the law when the slave had been carried or sent by the owner into the foreign country wherein he had been thus emancipated.<sup>3</sup> But a like judicial recognition of this emancipation may, perhaps, have properly been refused, in the country where the person had been a slave, if it had taken place by his voluntary escape ; by

<sup>1</sup> Animals *feræ naturæ* did not, by escaping, cease to be *res*, objects of property, but were the lawful prize of the first next captor. In the modern international case the slave has, by being in a jurisdiction wherein his slavery is not recognized, ceased to be property. It is absurd to conclude that escaped slaves are always the property of the owner from whom they escaped, from the proposition that they do not, like animals *feræ naturæ*, become *res nullius*, or the property of the first taker. The first question is, are they *res*, or persons? "The *jus postliminii* was a fiction of the Roman law, by which persons and things taken by the enemy were restored to their former state upon coming again under the power of the nation to which they formerly belonged. *Postliminium fingit eum qui captus est in civitate semper fuisse*. Inst. I. t. 12, § 5." 1 Kent, 108. Also, Dig. L. 49, tit. 15, (cited by Gudelin,) §§ 3, 4, 5, 15. Gudelin's conclusion is rather in analogy than otherwise with the law of postliminy; therein likening the foreign country, in which the slave became free, to a hostile nation or one with which the Romans had no friendly relations in peace. D. L. 49, t. 15. § 8. Inst. I. t. 12, 5. In pace quoque postliminium datum est; nam si cum gente aliqua neque amicitiam, etc., cited *ante*, p. 151, note 2.

<sup>2</sup> *Ante*, § 206, and the notes.

<sup>3</sup> But Lord Stowell in 2 Hagg. Adm. R. 100, 113, held, that even this would not be equivalent to manumission.

adopting, in this case, the rule of Roman law that the flight of a slave should not be the legal cause of the master's loss.<sup>1</sup>

§ 320. It would seem that if the status of the natural person whose condition was in question, had been that absolute chattel-slavery which was once recognized in universal jurisprudence, such person, though having that status under the law of some one country, could not have been said to have a *domicil* therein; and that there could be no determination of the question of status by recognizing the law of domicil, until he should have become a legal person. But if taken to a foreign country, by whose law he became free, he would therein, for the first time in his existence, have become a legal person; and his only possible domicil would then have been that country. And then the rule for determining the status according to the law of the domicil would have required a judicial recognition of his free condition even in the country where he had been formerly a slave.<sup>2</sup>

At least it may be assumed that the condition of slavery, in case of such return, could not have been supported by a reference to the law of domicil, if the former condition of the slave had been that of absolute chattel or *res positæ in commercio*.

§ 321. But if the condition of slavery had originally been that of a legal person, in a relation existing under the *jus proprium*, he would have had there a domicil. And it might be said, that the mere fact of his having been in another jurisdiction, where that relation was not recognized, was not, in itself, a change of domicil. It would depend upon the slave's capa-

<sup>1</sup> Cod. lib. vi. tit. 1. l. 1. *Servum fugitivum sui furtum facere, et ideo non habere locum nec usucapionem nec longi temporis præscriptionem, manifestum est; ne servorum fuga dominis suis, ex quacunque causa, fiat damnosa.* And from Dig. lib. xlix. tit. 15, l. 12, §§ 8, 9; l. 18, § 5; l. 27, 30, it appears that a slave taken by the enemy or stolen, could not acquire liberty as against his former owner by any emancipation otherwise valid.

In the time of Justinian, slavery being everywhere recognized, *jure gentium*, the modern international case of emancipation by mere change of jurisdiction could not have occurred. A close analogy might be found, where a captive enemy, sold as a slave among the Romans, had escaped to his own nation. Since he must have become free by operation of law there, the question might occur, if he should afterwards, in time of peace, come within Roman territory, whether he would be there free or not.

<sup>2</sup> *Ante*, pp. 49, 109.

city to acquire a domicil ; and upon his intention to do so, provided he had the capacity. If it should be held that such capacity could not exist independently of the master's consent, yet in cases where the slave was not a fugitive but had been carried, by the master, into a jurisdiction not recognizing slavery, the latter must be regarded as consenting to the operation of laws to which he voluntarily and unnecessarily had subjected himself. But still, in that case, the intention of the slave party to acquire a domicil must be essential, and it would not be acquired in cases where he had remained with his owner or master, and returned with him to their former common domicil.

§ 322. From the various authorities and instances which have here been collected, it appears that the correlative rights and obligations between persons who, in another state or forum, had sustained the relation of master and slave, had, in every state or forum of jurisdiction wherein the master had made a public claim for personal service, been regarded only as rights and obligations determinable by *private* international law and as subjects of ordinary judicial inquiry solely. Or again, to use a negative form of expression, the question of maintaining those rights and obligations, in the state or forum where the claim had been made, had never been regarded as one arising under *public* international law, (or the law of nations in that sense,) the rule—a law in the imperfect sense—operating on states or nations as its subjects. The demand of the claimant owner had not been made upon, or at least had never been entertained by the administrative officers of the state. Or again—in a different form of expression—the claim of such a master to such a slave had not been made as a demand for “extradition” or “rendition” upon those who might represent the state in its sovereign intercourse with foreign states and alien persons.

It may have been that, during the period which has herein been considered, such demands and extraditions were sanctioned and allowed by public international law in the case of convicted criminals or persons fleeing from justice. And it may have been that in that case such “extradition” was decided upon

without reference to any ordinary judiciary or administrative private law—the ordinary courts of law. It certainly does not appear that similar demands were ever allowed in Europe or America, if ever made, for fugitive slaves, at any time before the formation of the present Constitution of the United States.

§ 323. A variety of circumstances may be imagined in which the determination of rights and obligations arising out of the status of slavery would (from the fact that the persons, whose rights and obligations were to be determined, had at different times been subject to different jurisdictions)<sup>1</sup> present questions of private international law. But there are no records to show whether, except in the circumstances already considered, the application of that law to questions of personal status had ever during the colonial period, been exemplified in actual cases before judicial tribunals. And, except in these instances, the private jurists of the time now under consideration do not appear to have examined into its application. No examination therefore will be here attempted of any such supposable cases.

§ 324. Recurring again to those laws which have already been described as having a personal extent, in reference to two classes of persons in the American colonies, and thus having had an international or *quasi*-international operation therein,<sup>2</sup> although the relative rights of persons, of European birth or descent, with respect to things or classes of things might differ in the several colonies, the law of individual and ordinary relative rights and relations wherein persons were the objects of action, was substantially the same, for domiciled inhabitants of the English colonies in each colony as in England itself. When therefore the inhabitant of any particular jurisdiction of the empire, being of European race, appeared within any other particular jurisdiction of the empire, although his rights in relation to things might differ from those of the domiciled inhabitant of that jurisdiction, and the determination of his relations, in that respect, might present a case of the so called “conflict of laws,”<sup>3</sup> to be con-

<sup>1</sup> *Ante*, § 74.

<sup>2</sup> *Ante*, §§ 193, 208, 241–246.

<sup>3</sup> Compare Chalmers' *Pol. Annals*, 698, 692.

ained by the private international law, as known in that jurisdiction, yet his individual and ordinary relative rights, constituting his personal condition or *status*, were, by force of the national law of the empire, the same as those of the domiciled inhabitant of the same race in like circumstances of natural condition; that law having the effect of an international law in securing to him those rights in each several jurisdiction of the empire, though not therein domiciled.

The English law of rights and liberties, being thus a personal law to the domiciled subject of European race, secured to him the right of locomotion and residence throughout the empire, irrespectively of the boundaries of particular jurisdictions; and gave him the right of acquiring a domicil in any part of the national domain.

§ 325. If the domiciled white inhabitant of one of those several jurisdictions appeared in another claiming therein the rights of an owner in respect to a person held by him as a slave in the place of his domicil, that claim could be supported by the force of "the common law," as the personal law of the privileges of the master having national extent, only, if ever, while the historical *law of nations*—universal jurisprudence—recognized chattel slavery. For, as has been shown, it was only by virtue of this *law of nations*, that chattel slavery could be held to be supported by the *common law of England*. Although the right of private property was an individual right under "common law," yet, in England, property was to be defined either by universal jurisprudence or the local internal law of England,<sup>1</sup> and it has been shown that servitude under the internal law of England was known only as a feudal relation, except while the *law of nations*, judicially cognizable, supported chattel slavery.<sup>2</sup> When that law, during the colonial period, became changed, the extent of the right of property under English common law became modified. Therefore admitting that, at the introduction of slavery into the colonies, the common law of England recognized slave property,<sup>3</sup> yet, towards

<sup>1</sup> *Ante*, § 215, 244.

<sup>2</sup> *Ante*, §§ 291, 292.

<sup>3</sup> *Ante*, §§ 201, 281.

the end of the colonial period, the right of a domiciled master in respect to his baptized, civilized, American-born negro, (whether by law a chattel, or a bond person,) rested in the place of his domicil, upon the local law only, and its recognition in any other colony depended upon the principle of comity with its limitations, as they have been before described.<sup>1</sup>

§ 326. So, on the other hand, although the condition of a person of the African or Indian races, domiciled in any one jurisdiction of the empire, might, under the local law of that jurisdiction, consist in rights of the same legal nature as those which characterized the condition of an inhabitant of the same jurisdiction who was of the English or European race, yet those rights were the result of a law confined in its territorial extent to that jurisdiction, and not of a law having national extent; and therefore the support of those rights or of that condition would depend, in any other part of the empire, upon the private international law as received and applied therein by the *local* (colonial) source of power.

§ 327. It would depend upon the actual international recognition given by different nations to the relations of alien negroes, created under the laws of their domicil, whether any principles, having personal extent to them only, should acquire the character of a *law of nations* or a rule of universal jurisprudence, after the time at which chattel slavery had ceased to be supported by that law. If, for the negro race, in international relations created by the public and private law of different countries, only a partial recognition should be made of a condition of rights and privileges, such as in like circumstances would be given to whites, then, although the slavery of an alien negro might not be internationally recognized, there might a certain condition of social inferiority be assigned to him in the forum of jurisdiction, based upon universal jurisprudence.

But it has been shown that the condition of a private person in respect to privilege can be attributed to the *law of nations*

<sup>1</sup> See *ante*, p. 324, where it was *assumed* that before the close of the colonial period the right of ownership would not have been sustained by the "common law of England" having personal extent throughout the empire. It is here stated as *proved*.

only so far as it embraces relations which will continue the same, notwithstanding a change of jurisdiction ; and that, when chattel slavery is no longer recognized, no other condition of a private person can be attributed to universal jurisprudence than such as consists in the rights and obligations of the family, and those resulting from contracts. There is nothing in the history of either international or of municipal (internal) jurisprudence, during the colonial period, to indicate that there was any definite condition of a legal person, in respect to those rights which could be recognized in the case of an alien negro under a judicial derivation of law, and which might not equally have been attributed to a white or European. In all parts of the American continent, however, domiciled negroes or Indians were placed in an inferior condition to the whites ; in respect either to civil or political privileges ; and in that branch of the law which has been called police law, applying equally to aliens and domiciled persons, derived from statute regulation, a distinction had been made between free negroes and free whites, and the same distinction existed in all the colonies settled by European nations in America. This fact, of so general prevalence, may perhaps be said to have constituted during the colonial period a recognized disability in persons of the negro race under the “law of nations ;” in this sense, that, unless specially provided against, all international transactions or agreements, affecting the right of the subjects of different countries, would be supposed to have admitted the distinction.<sup>1</sup>

§ 328. When chattel slavery had thus ceased to be supported by the jurisprudence of the greater number of civilized nations, although the trade or commerce in slaves might still be legal by the authority of other states, yet it could be maintained only in such parts of the world as the nation sanctioning it might have jurisdiction over the persons engaged in it. The slave-trade on and from the coast of Africa, though, for this reason, not supported by the *law of nations*,—in the sense of *universal jurisprudence*, at the close of the colonial period, can-

<sup>1</sup> In connection see *ante*, §§ 19, 75, 112, 168–170.



not be said to have been *contrary* to the "law of nations;" either in that sense, or in the sense of a law of which nations are the subjects; for, according to the acknowledged principles of that law, each nation might permit its own subjects to engage in the traffic on the coast of Africa. It would have been a topic of public international law only so far as it might have been the subject of an agreement between such a slave-trading nation, and the sovereign of that part of the coast of Africa from which the negroes should have been purchased:—supposing that there should have been there any organized civil authority. Even the forcible abduction or kidnapping of the native inhabitants by the subjects of a civilized government might have been legalized by such government; and it would not have been contrary to international law, except so far as it violated the rights, under the public international law, of the sovereign to whom the persons kidnapped might have been subject, if any such sovereign could have been found.

§ 329. An act of criminal violence committed by private persons upon the high seas, or anywhere beyond the territorial jurisdiction of organized civil governments, is an act punishable by the tribunals of the sovereign of the persons committing the injury. If such act of violence is allowed or sanctioned by such sovereign, it then becomes, according to the public international law, an injury against the sovereign of the persons injured,—supposing them to be the subjects of an organized civil government; the remedy for which is beyond the jurisdiction of courts of justice. But a nation may grant jurisdiction to another, or to all others, of crimes committed by its own subjects; and, by the consent of all European nations, it has been agreed that some acts of violence, by private persons, shall be punishable not only by the tribunals of their own sovereign, but by those of any nation which may obtain control over their persons. Such acts are therefore not merely contrary to the rule of right enforced by every nation, and therefore such as may be said to be contrary to universal jurisprudence—the *law of nations*; but they are acts over which every nation has *jurisdiction*, irrespectively of the national character of the persons committing them.

They are therefore criminal under the "law of nations," in a peculiar sense—the sense of a law of which private persons are the subjects, and which any nation may vindicate ; and which is public international law also ; because the right of thus vindicating it, irrespectively of the national subjection of the culprits, is dependent upon the consent or contract of different nationalities. An act of this character—one which may thus be punished, is technically called *piracy*. Piracy may be defined to be one of those acts which the tribunals of any nation will take jurisdiction of, and will punish.<sup>1</sup>

Although the African slave-trade was no longer supported by the *law of nations—universal jurisprudence*—at the close of the colonial period, it would not have been a criminal act on the part of the persons engaging in it, unless forbidden by the legislation of their own sovereign. And even if so forbidden, it would not have been punishable by the courts of any other nation as piracy, unless by the consent of that sovereign.

<sup>1</sup> There is an ordinary use of the terms *piracy*, *pirate*, *piratical*, in which acts of robbery and murder are discriminated according to the place wherein committed—the high seas. But in the phrase "piracy by the law of nations," the designation has reference to the common jurisdiction which nations will assume over it. Compare the variety of opinion, on this question of definition, in *United States v. Smith*, 5 Wheaton, 153.

## CHAPTER XI.

OF THE INVESTITURE IN THE PEOPLE OF THE SEVERAL STATES  
AND OF THE UNITED STATES, OF THAT SOVEREIGN POWER  
WHICH IS THE BASIS OF CONDITIONS OF FREEDOM OR OF  
BONDAGE.

§ 330. By the Revolution and the war which was terminated by the preliminary treaty of peace of November 30, 1783, the English colonies, a portion of whose juridical history has been herein considered, became politically separated from the British empire, and a new sovereignty,<sup>1</sup> known to the rest of the world as the United States of North America, became established over their territory. To the legislative or juridical action of this sovereignty or sovereignties, the subsequent existence of any rights or obligations incident to freedom or liberty and its opposites, regarded as the conditions or status of private persons within their territorial dominion, must be referred.

§ 331. Freedom or liberty, taken even in the widest or most general sense—that of the mere negation of restraint, must vary in significancy according to the nature of the *subject* of which it is predicated, or the capacities of that subject for acting or being acted upon.

When freedom or liberty is attributed to a being capable of choice and action, and is not taken as the simple negation of restraint, but as a positive condition of moral privilege in reference to some rule of action, it varies in its significancy, not only ac-

<sup>1</sup> This term, primarily signifying supreme or sovereign power in the abstract, or the possession of that kind of power (Webster's Dict.), is often used also, as here, for the concrete,—the power and the possessor of it.

According to the object or purpose of the rule, but also as that rule may vary in its absoluteness or necessity, and in its relations to space and time.

When the terms freedom and liberty or their opposites are used to express the condition of a natural person, who is a member of some civil society or state, and that condition is considered apart from all ethical views of its naturalness or inherent correspondence with the nature of man, and only as consisting of a variety of rights or obligations in certain legal relations determined by the positive law, based on the authority of that civil society or state,<sup>1</sup> it cannot be described without at the same time defining the law, which originated these relations, in its absoluteness or necessity, and in its temporal and territorial extent.

When describing freedom and its opposites as the effect of the laws of the United States, it is therefore proper to consider those laws in their necessity, authority and jurisdiction ; as well as in their object, or their direct effect upon personal condition by the creation of legal relations.

These attributes of the nature of law, which are therefore, of necessity, limitations of the existence of freedom and its opposites, are incidents of that relation of superior and inferior, which is an essential element or constituent of a law in the primary sense.<sup>2</sup>

§ 332. Since each national sovereignty is the ultimate or supreme authority for the law of that national domain in which it is supreme, (in the sense given to the word *law* in the previous chapters,) it is not to be considered as being itself dependent on that law for its existence, or its possession of that supreme authority ; which possession can be said to be fixed and determined only by those general principles which are, in fact, a law only in the secondary sense, and constitute that "natural or necessary law of nations" which has been referred to in the first chapter.<sup>3</sup> This existence, or this possession of sovereign power must be assumed as rightful in every applica-

<sup>1</sup> *Ante*, §§ 4 -43

<sup>2</sup> *Ante*, § 2.

<sup>3</sup> *Ante*, § 49.

tion of rules of action which are called *its* municipal or national law.

The question of the seat or investiture of sovereign power can therefore be a historical question only, or a question of fact, as that of its nature and extent is ethical. These are essentially political,<sup>1</sup> and not legal questions. Or, although they may be called topics of public law, it is of law in a sense antecedent to legislation or jurisdiction, which is the manifestation of a sovereignty, of law in the secondary sense—the statement of a mode of action.

§ 333. But although the possession of sovereign power is not determined by the *law*, it is the first necessity of judicial action, in recognizing any precepts as law, to acknowledge their source as being the sovereign or “supreme power of the state;” since the law in asserting its authority claims its origin in that power. In this view the political principle of the seat of sovereignty becomes also the fundamental doctrine of municipal (national) law.

The possession of sovereignty being a fact, and not an effect of law, whatever written memorials or declarations of the rightfulness of any national sovereignty may exist, they can only proceed from itself, and they can only be taken as historical evidences of its existence; not as law controlling that possession of sovereign power which they assert. And the authors of those declarations must always be supposed to have the right to substitute others of different tenor and equal juridical authority. There can therefore be no written constitution of government so authoritative in its nature or expression as to determine the rightful sovereignty—the rightful holders of that rightful supreme power; since before that constitution has effect as law it must be recognized to be the act of sovereign power—power above all law in the ordinary sense.<sup>2</sup>

§ 334. While therefore those written instruments which are

<sup>1</sup> *Luther v. Borden*, 7 Howard U. S. Rep. pp. 39, 51–58.

<sup>2</sup> De Maistre, on the Generative Principle of Political Constitutions, Transl., Boston, 1847; 18mo, p. 41. “The more we examine the influence of human agency in the formation of political constitutions, the greater will be our conviction that it enters there only in a manner infinitely subordinate, or as a simple instrument; and I do

known as the Constitutions of the several States and of the United States, and legislative or juridical power derived from them are juristically assumed to be the foundation of all legal rights and obligations existing within the domain occupied or held by those States, that assumption involves a previous political recognition of some existing sovereignty or possession of supreme power within that dominion, and the conception of the absoluteness, necessity, and temporal and territorial extent of the positive law contained in those Constitutions, or derived from them, will depend upon the political theory of the investiture of that sovereign power from which they proceed. At the same

not believe there remains the least doubt of the incontestable truth of the following propositions :

" 1. That the fundamental principles of political constitution exist before all written law.

" 2. That constitutional law is, and can only be, the development or sanction of an unwritten pre-existing right.

" 3. That which is most essential, most intrinsically constitutional and truly fundamental is never written, and could not be without endangering the state.

" 4. That the weakness and fragility of a constitution are actually in direct proportion to the multiplicity of written constitutional articles."

See also the preface to the same essay, p. 11.

The ideas of De Maistre are correct when the question is—what determines the existence of sovereignty, or the investiture of sovereign power? No written constitution can exist *a priori*, or have an *a priori* authority. There must have been an existing sovereignty to originate such constitution. The fallacy in his writings lies in confounding law, in the primary sense, with a mode of action; and law, in the ordinary sense or legislation, with political ethics. A similar fallacy is common with authors of the extreme opposite school. De Maistre says: Because it is impossible to establish a supreme government without acknowledging the existence of an anterior sovereign, therefore all actual sovereignties are the creation of the Deity, and arise independently of man's agency: which may be admitted. But he then asserts that sovereignty can never be in the nation or people; because, he asserts, the Deity has never actually sanctioned popular sovereignty, but, always, monarchical sovereignty; professing to learn this from history: that is, he asserts this as a law in the secondary sense. But here he assumes that he, or some one, can determine the will of the Deity and interpret facts by it: for he asserts that no actual possession of power by the people has ever been a legitimate possession. But he who could interpret facts by an assumed law of the Deity would be the only earthly sovereign. De Maistre describes the legitimacy of monarchy as power above law, and "legitimate usurpation," that is, the continued fact proves its own lawfulness. But the same criterion has legitimated popular sovereignty in America; unless his own standard of duration also is to be received. "On nous cite l'Amerique; je ne connais rien de si impatientant que les louanges décernés à cet enfant au maillot; laisser le grandir." By his argument there can be no legitimate sovereignty in the United States, nor, by consequence, any law: unless the act of George III. in the treaty of peace, 1783, may be, on his principles, a legitimate grant of power.

In the same manner Tucker, Paine and others would prove that no sovereign power can be held except by a compact of the individual members of society; and that all juridical power previously exercised throughout the world, antecedent to the American Revolution, was illegitimate; or that no law existed before that time. But, in fact, their argument would equally prove that no law, even now, exists in the United States.

time the existence of that sovereignty is part of the customary or unwritten jurisprudence of the land, whatever may have been its comparative duration ; that jurisprudence being entirely historical, as opposed to analytical ; or, nothing else than the mere history of the acquisition and continued possession of sovereign power.

§ 335. The events which may be regarded as the continuous act by which these Constitutions were produced, and the words and expressions which made part of those acts and of their record, must determine the existence of that sovereignty which has given these Constitutions their force. But since the political significance of all events, not resulting from positive law, must always be liable to variety of appreciation, in view of different doctrines of political expediency, different political theories may be derived from those events, leading to different juristical views of the legal force and extent of the provisions of these Constitutions. For this reason every historical narrative of those events must be liable to exception in view of some one of those theories, or, to change the form of expression, the narration will be also the exposition of some of those theories.

§ 336. The nature of civil government and of positive law is such that in every state there must be some persons who actually hold, use or enjoy the power or right of the state or of civil society to create coercive rules of action for individual members of the state, and some whose legal liberty of action is determined by those rules.<sup>1</sup>

<sup>1</sup> Austin's Prov. Jurisp., p. 255. "An independent political society is divisible into two portions ; namely, the portion of its members which is sovereign or supreme, and the portion of its members which is merely subject. The sovereignty can hardly reside in all the members of society, for it can hardly happen that some of the members shall not be naturally incompetent to exercise sovereign powers," &c.

Papers, &c., Juridical Soc., Vol. I. Part I., London, 1855, p. 80. On the Conception of Sovereignty, &c., by A. S. Maine, LL.D. "First then, the human superior, who is to be sovereign, must be *determinate*. He need not be a *single person* or *monarch*. There can be no grosser mistake than this, though it is constantly perpetrated by jurists whose place of birth leads them to associate "sovereignty" with "despotism," and who are perpetually committing themselves to propositions which, if construed rigorously, would either deny the existence of governments like our own and that of the United States, or at all events brand them with the stigma of illegitimacy. Nor again can "sovereignty" be said to reside in the entire community—an error the exact opposite of the misapprehension just alluded to, and one to which French writers on public law seem especially liable. Their meaning may perhaps be that no body of individuals,



Though the word *people*, employed in these Constitutions, may, in a certain ethical and political sense, be taken to mean the whole body of the inhabitants of certain districts, or an aggregate of natural persons constituting a portion of civil society, and each one being, in some undetermined manner, represented in exercising sovereignty,<sup>1</sup> it is yet evident that only a portion of the adult male inhabitants have in fact exercised this supreme or sovereign power of constituting governments and laws.<sup>2</sup>

§ 337. There had always been a distinguishable portion of the individual inhabitants of the several colonies, who, as free-men or electors—persons possessing an elective franchise—had always had a basal or primary political existence, belonging to them as uniting the national character of British subjects of English birth or descent and the local character of corporate members of a province or a chartered colony—a political existence, underlying all forms of local government, which had formerly been manifested for local municipal and colonial objects either by direct political action or through that of elected representatives, and the same persons had always claimed a right to manifest the same for national purposes, whenever called upon to fulfil the political duties of colonial members of the British nation.

§ 338. The colonial governments had been of various constitution, being dependent, in different degrees, on the power of the crown, according to the terms of their charters, patents, or other fundamental law, and all more or less distinctly founded on the basis claimed by the colonists of being governed, in local

except the entirety of the people, *ought* to be recognized as superior; but a dogma like this is something very different from the statement of a *fact*; and the truth is that no government corresponding with the description exists in the world. All known polities are either *monarchies* or *oligarchies*, since, even in the most popular, women and minors are excluded from political functions."

Compare Story's Comm. § 327, where the author flatly contradicts himself; assuming it to be a "general principle that the majority has at all times a legal right to govern the minority,"—yet saying that in fact it is always a minority which governs.

<sup>1</sup> Bouvier's Inst. of Am. Law, vol. I. p. 9. "Abstractedly, sovereignty belongs to the people and resides essentially in the body of the nation: but the nation, from whom emanate all the powers, can exercise them only by delegation."

<sup>2</sup> So *populus Romanus* never signified all who were called Romans, see Smith's Dict. Antiq. voc. *Plebes*, *Patricii*.

matters, by laws to which they had themselves, in their political capacity, not individually, but as a political integer or corporate body, and by representation, assented.

But, as has been previously stated in the third chapter, although the colonial Governments were more or less republican or popular in their form, by this recognition of a portion of the people or inhabitants as having a distinct public capacity and character, yet the political constitution of the colonies resembled that of England in this—that the attributes of sovereignty, not held and exercised by the central imperial Government, was vested rather in a local Government, or a political organization holding legislative, judicial, and executive powers, than in the whole body of, or in any distinct portion of, the inhabitants of such colony.<sup>1</sup>

§ 339. Assuming these antecedents, it may be asserted that the political change which occurred in the events of the American Revolution, did not consist in the separation of the colonial Governments from that of Great Britain, and in the enlargement of their share of sovereign power by the accretion to each of those before held, over their several territory, by the imperial Government. Nor yet, upon the revolutionary separation of the colonies from the British empire, at whatever point of time that is considered to have taken place, did the people or inhabitants of the colonial territory resolve into a mass of natural persons without civil organization, who by the aggregate of their individual authority, under some law of nature, formed themselves into new political communities.<sup>2</sup>

But in the Revolution these Governments became themselves essentially changed, so far as they had not been the instruments of the political action of that portion of the inhabitants, while the political existence of that portion continued without change; and they thereafter determined for themselves, either expressly or by implication, the fundamental or supreme public law of the territory they occupied; that is to say, all public law subordinate

<sup>1</sup> *Ante*, § 131.

<sup>2</sup> 1 Curtis' *Hist. of Cona.* p. 16; Calhoun's *Essay*, 1 *Works*, 190; Paley's *Moral and Pol. Phi.*, B. VI. c. 3. There was no illustration of the "social compact" doctrine as some have imagined; comp. 1 Tucker's *Bl. App.* p. 1-9.

to the fact of their possession of power, which was founded on Revolution—the exercise of autonomic force, and was a law in the secondary sense only.

§ 340. The several acts composing the Revolution proceeded from bodies of various political character and authority, being partly the acts of legislative assemblies representing the popular element under the old local Governments, and partly of bodies entirely revolutionary in their origin and purpose, deriving their authority from the choice and sanction of local majorities among the electors of districts varying very much in geographical extent and political importance, as compared with the entire colonial district of which they formed a part.<sup>1</sup> The individuals who, in the beginning of the Revolution, visibly exercised powers not held by the colonial Governments, under the previous order of things, or powers incompatible with the maintenance of that order, may have been members of those Governments at the time, and may thus have represented separate colonial polities, or what had been such under the public law of the empire. But by the revolutionary action they must have lost whatever in that political character represented the power of the crown, or the imperial authority, exercised in and for a distinct province or colony. So far as they had a political character derived from the previously recognized local element of sovereignty, they may still have claimed to represent a distinct polity, replacing, or succeeding to the provincial. But they could not have had, from that previous political character, the capacity to exercise powers which had not before been held by them in virtue of that local element of sovereignty, under the public law of the united empire. They could not, by virtue of their previous character of representatives of the local colonial authority, assume to hold powers which were, before, customarily invested in the central imperial Government.

To whatever degree they may have done so, it was as the agents of the freemen, or possessors of the elective franchise, who

<sup>1</sup> Graham's Hist. of U. S., vol. 8, p. 874, &c. G. T. Curtis' Hist. of Const. of U. S., vol. I., p. 7, and South. Quart. Rev., Jan. 1855, p. 177-180. Life of Elbridge Gerry, vol. I., ch. 4, 5.

now assumed supreme powers as original in themselves, acting in their corporate capacity of the political people of States succeeding to the political people of colonies. It was this portion of the people, in their primary form of organization as the *political people* of the several States and (by *revolution*) of a national state, who exercised sovereign power for national and local purposes, being the same individuals who had before exercised political powers and rights in the government of a township or county, and shared by representation in the colonial government; their numbers, in each new State, in proportion to the whole number of the inhabitants, depending on previous usage and existing laws. In those colonies where the local Governments had been more immediately derived from a political people, or portion of the inhabitants thus exercising political power, and which were even then distinguished as *popular*, the forms of their colonial chartered polity were continued. In other colonies, old forms of government, more visibly gave way to the assumption of sovereignty by the people. But the political corporeity of the people, as it had existed in the colonial state and had there been manifested, continued<sup>1</sup> in the existence of the political people of one of the United States, thereafter exercising, under new forms of representation, independent and supreme powers; severally, in their particular colonial limits, for State purposes; and for national purposes, in union with the political people of the other revolted provinces.<sup>2</sup>

<sup>1</sup> Therefore the citizens of Mecklenburg County, North Carolina, did not become, on the 19th of May, 1775, what they declared themselves to be, when they resolved "that we do hereby declare ourselves a free and independent people, are, and of right ought to be, a self-governing association, under the control of no power other than that of our God and the General Government of the Congress; to the maintenance of which independence we solemnly pledge to each other our mutual co-operation, our lives, our fortunes and our most sacred honor."—And resolved, "that as we now acknowledge the existence and control of no law or legal officers, civil or military, within this country, we do hereby ordain and adopt," &c. See *ante*, laws of N. C., p. 296.

<sup>2</sup> By resolution of the General Congress, May 10 and 15, 1776, "That it be recommended to the respective assemblies and conventions of the United States, where no government sufficient to the exigencies of their affairs has been hitherto established, to adopt such government as shall, in the opinion of the *representatives of the people*, best conduce to the happiness and safety of their constituents in particular and America in general." The Congress of the colony of New York, by resolution, May 31, 1777, expressed doubts of their powers in this respect, and that "it appertains of right solely to the people of this colony to determine said doubts." (1 R. S. of N. Y., p. 21, Prefatory to the first State Const.) Mr. Hildreth, vol. III., Hist. of U. S., p. 375.

§ 341. This change of the possession and investiture of sovereign power was manifested by the united and several constitution of new organs of government, and the investiture and distribution of political powers, for several and united action, in and among such organs. It did not and could not, as to either sphere of action, take place by a perfectly simultaneous or harmonious movement on the part of the political people of all the colonies at once, or through like instrumentalities in each. There may, however, be less difficulty in distinguishing the assumption of some of the powers of sovereignty for national purposes, and the united exercise of them by the people of the new States, than in distinguishing the several assumption by the people of those States, of powers used for local or State purposes.

In some of the colonies the powers of sovereignty formerly exercised by the colonial Governments could hardly be recognized as transferred to the political people of the new State, until after other sovereign powers, of a more national and external character, had been claimed and exercised by the same people as part of the people of the united colonies assuming a national character.<sup>1</sup>

§ 342. The American colonies, though under separate colonial Governments, each of which exercised or claimed some sovereign powers within their respective territories, or which shared with the imperial Government the possession and exercise of all sovereign powers within such territories, were, equally with the British islands, part of one and the same empire; and, as to each other, were of one nation, over which the residue of sovereign and national power, beyond that vested in the local Governments, was exercised in a single and undivided manner.

Their separation from the rest of that empire was a single political result, effected by the combined action of the political

says, after sketching the formation of State governments at this time, "for all practical purposes—even to the extent of alterations of the constitution, except in a few States, where different provisions were made—the sovereign power was vested in the respective State Legislatures, which, &c." This view is not generally adopted by jurists, unless of the southern State-rights school. *Comp. South. Quar. Rev.*, April, 1858; review of Calhoun's Essay, p. 398.

<sup>1</sup> Compare the facts stated in 3 Hildr., 874, Pitkin's Hist. of U. S. c. 6, 7.

people of the several colonies, manifesting an integral sovereignty by the assumption of that power over their united territories which had formerly been held over the same by the crown and parliament of England. So that while the attributes of sovereignty which had been severally exercised by the colonial Governments were continued in the several possession of the people of the States, and were increased by the several assumption of other powers, the same political people, by a joint assumption of other powers—the residue of sovereignty—and their exercise in a national character, for internal and external relations, presented themselves and all other inhabitants of the country as one people and a sovereign nation among other sovereign nations.<sup>1</sup>

§ 343. Since the individuals constituting the people, (as above discriminated from the mass of the inhabitants,) had never exercised political rights except as already organized into political bodies preëxisting under the colonial condition, they could never have acted in union for national purposes except as so primarily organized. They could not have established any general government without acting in the only form of political existence they had had ; unless all forms of political organization had been dissolved. For the political capacity of no single individual or natural person was inherent or primordial in himself, but derived from the existence of the colonial corporate body ; and it was only these corporate bodies which now, by the revolution, acquired a primordial existence, and held sovereign power by right of fact—right above law.<sup>2</sup>

Of necessity, therefore, the people of the United States, in combining together for the exercise of sovereign power for national purposes, have not acted as a homogeneous body of individuals, but as organized, for the purpose of such action, into primary political unities identical with those in which they have exercised the residue of sovereign powers severally, for the purposes of a State government.

<sup>1</sup> 1 Kent's Comm., page 201 ;—"The association of the American people into one body politic took place while they were colonies of the British Empire, and owed allegiance to the British crown."

<sup>2</sup> De Tocqueville, *Democ. in Am.*, vol. 1., ch. 5, (p. 51,) supposes that the people

§ 344. Where, under positive law, a number of persons together constitute a corporate body and where all, in determining the action of that body, have, by law, equal powers, the legal principle obtains that the body acts by the will of the majority, or, that the will of the majority is the will of the corporate body.<sup>1</sup> But it is necessarily assumed that the people known as the people of the United States have a primordial existence as the people of the several States, and that, so corporately organized, they possess all their powers by right above law, or by law in the secondary sense only—the statement of the fact. The mode in which they hold or can exercise sovereign power is known only by its actual exercise. Therefore, to maintain the doctrine that the people of the United States have a corporate existence or a corporate possession of sovereign power for the purposes of an integral national existence, it is not necessary to assume that the action of that corporate body has been or would be determined by the will of the majority of the States : or that the principle of action by majority is an element of their corporate existence. And the fact that this national power was exercised by the concurrent action of the people of all the States, and not by the action of the people of a majority of the States, does not indicate that the exercise of this power was the result of a federal union of the people of all the States, each holding the sum of sovereign power in severalty.<sup>2</sup> Though, in fact, the revolutionary assumption of sovereignty over their united territory was a unanimous act, and though the corporate people of each State acted for that purpose freely and without compulsion from a majority, the sovereignty so exercised may still have been held by them as the constituent parts of an integral nation, and not in severalty. And it is impossible to say how

or freemen of each *township* constitute collectively the primordial political integer, and that its existence is independent of the collective people of the State. There is much in the early history of the N. E. colonies to justify this idea. But, since the revolution, there can be no doubt that in each State sovereignty is vested in the whole body of electors.

<sup>1</sup> Refertur ad universos quod publice fit per majorem partem (Ulpian.) *The public act of the majority is the act of all.*

<sup>2</sup> As is argued in Federalist No. 89 by Madison ; and 1 Tucker's Blackstone, App., p. 146 ; 1 Calhoun's W., p. 150, 151 ; Baldwin's Const. Views, pp. 18–25.



that national power would have been exercised or manifested if any State or minority of States had refused to co-operate with the majority, in the assumption of national power.<sup>1</sup>

§ 345. The delegates in the Revolutionary General Congress which July 4th, 1776, "in the name and by the authority of the good people of these colonies," declared the "united colonies" to be "free and independent States," received their powers under electoral agencies differing greatly in their connection with the people whom they assumed to represent.<sup>2</sup>

In or by the Confederation, the integral people of the United States exercised national power by the intervention of the same organs of government which they employed in their local or State Governments.<sup>3</sup>

In or by the Constitution, the same people, without a revolution, without any shifting of the seat of sovereign power,<sup>4</sup>—exercised national power by a Government instituted by the direct action of the people of each State.<sup>5</sup>

This nationality or integrity of the people of the United States, coexistent with a separate possession and exercise of sovereignty for local or State purposes, has continued in a

<sup>1</sup> Significant, in illustrating the abnormal condition of the revolted colonies, are the proceedings in the General Congress relative to the Parish of St. John's in Georgia, which sent a delegate three months before any were sent to represent that colony. Journals of the first Congress, May 13, 15, 27, 1775; and their reception of the Mecklenburg Declaration.

<sup>2</sup> 1 Curtis' Hist. of Cons., p. 13, note.

<sup>3</sup> The same, p. 245. 1 Kent's Com. 208; Journ. Cong. May, 1775, p. 69–74.

<sup>4</sup> An opposite doctrine has the authority of the opinion of the court in *Dred Scott's* case, 19 Howard, 441: "The new government was not a mere change in a dynasty, or in a form of government, leaving the nation or sovereignty the same, and clothed with all the rights, and bound by all the obligations of the preceding one. But when the present United States came into existence under the new Government, it was a new political body, a new nation, then for the first time taking its place in the family of nations. It took nothing by succession from the Confederation. It had no right, as its successor, to any property or rights of property which it had acquired, and was not liable for any of its obligations. It was evidently viewed in this light by the framers of the Constitution."

<sup>5</sup> Federalist, No. 39, *McCulloch vs. Maryland*, 4 Wheat. R., 314. 1 Curtis' Hist. of the Const., p. 873. Resolution of the Congress of the Confederation, 28 Sept., 1787, that the report of a constitution for the people of the United States made by the convention "with the resolutions and letter accompanying the same, be transmitted to the several legislatures in order to be submitted to a convention of delegates chosen in each state by the people thereof, in conformity to the resolves of the convention made and provided in that case." And resolution of Sept. 13, 1788, reciting the above and declaring the constitution to have been ratified accordingly. Journals of Congress and 1 Rev. Stat. of New York, p. 17.

manner and form more or less distinctly recognized, from the period of the separation of the colonies from the mother country to the present ;<sup>1</sup> and no former colony, nor any State, nor the people of such, has appeared in international action with foreign states, or in intercourse with the other colonies or States, as using severally all the powers inherent in sovereignty ; while they have each, that is, the people of each, used or held some of those powers independently and without claim of control from each other or any majority of the whole.<sup>2</sup>

§ 346. If the language of the Constitution does not base its authority upon or recognize any other theory, and if for aught that appears from it, independent of theory, it may be merely declaratory or constituting, not granting, giving, or conveying, (except in the institution of a subordinate Government,<sup>3</sup>) and if the facts which led to the actual customary recognition of the written Constitution do not contradict the view,<sup>4</sup> it may be

<sup>1</sup> 1 Kent's Comm. (6th ed.) 217, note citing authorities.

In the second Article of Confederation it was declared, "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States in Congress assembled." This is urged as proving each State to have been possessed of integral national sovereignty, (1 Calhoun's W. p. 148, 149.) But since no declaration of sovereignty can be more than evidence, it may, as such, be compared with other testimony. So, too, the declaration of July 4th asserted the colonies to be free and independent States. But declaring a state of things, does not make it. The question still is, *how* did these States hold sovereign power? The accompanying declarations of an existing state or condition of private persons, "that all men are created equal," &c., and have "unalienable rights," did not determine any private conditions, even though the state of private persons is the effect, and not, like sovereignty, the cause of law.

<sup>2</sup> Any adequate reference to the authorities from which this historical summary is supposed to be derived would occupy a disproportionate space, and if attempted, would, probably, be unsatisfactory, since all the written histories of this period are viewed with various degrees of deference by persons differing in political sentiment. Pitkin's History of the United States presents the leading events in a simple form of narration, yet with special reference to their bearing on the political or public law of the Union. Chapters vi, vii, xi, and xix of that work may be noted as relating to the period here referred to.

<sup>3</sup> Throughout the six Articles of the Constitution the people of the U. S. *grant* powers to different departments of a Government, and being granted as separate *functions* of government, the Government holds those powers under a law. The only instance in which an assignment of powers *to the United States* is spoken of, is in the tenth Amendment, where it is called a delegation. "The powers not delegated to the United States by the Constitution," &c. This is, in fact, a discrepancy with the main instrument, and should be construed to harmonize with it, not to alter it; no powers being therein granted or delegated to the U. S., but to the Government; the U. S., the people of the U. S., being the granting or delegating party. Comp. 1 Calhoun's W. p. 240.

<sup>4</sup> Compare the summaries of the facts in Calhoun's Essay, 1 Works, 188-190, and in 1 Story's Comm. § 109-115.

justly regarded as the necessary and only doctrine of *law*, under the instrument, that the powers assigned by it to the Government of the United States are equally original and sovereign in the hands of a political unity, called the people of the United States, as the sovereign powers not so granted and not prohibited to the several States are original in the possession of the people of the several States ; that is, the Constitution, as a political fact, is evidence of the investiture of certain sovereign national powers in the united people of the States, antecedent to the Constitution, as well as of the residue of sovereignty in the same people in their several condition of the people of distinct States. It being here taken as a principle, independent of the Constitution, that sovereignty is not necessarily, in theory or practically, concentrated in one locality : its place being determined, as any other fact, from historical evidence.<sup>1</sup>

This will hereinafter be assumed as the obvious legal doctrine on this point ; wherever, in the absence of judicial decisions, it becomes necessary to refer to any such theory for the construction of the instrument.

And in accordance with this view, the term *national Government* will be used as a proper designation for the Government established by this Constitution.<sup>2</sup>

<sup>1</sup> Compare on this point the remarks in the beginning of ch. vii. Judge Wilson, (one of the signers of the Declaration of Independence,) in *Chisholm v. Georgia*, 2 Dallas, p. 419. Judge Paterson, (one of the framers of the Constitution,) in *Talbot v. Janson*, 3 Dallas, p. 154, speaking of "sovereignties in a sovereignty." Mr. Grimké, in *State v. Hunt*, 2 Hill's So. Car. R. p. 39, spoke of divided sovereignty as having been exemplified in the feudal institutions of Europe. Other counsel in that case, see p. 97, spoke of it as an impossibility.

<sup>2</sup> Mr. Calhoun, 1 Works, pp. 114, 118, admits that the use of the term, as distinguished from *federal* or *general*, has become prevalent. And, in harmony with this view, the word *State*, when applied to a member of the American Union, is herein commenced with the capital letter, as being a proper noun, and thus intended to be distinguished from *state*, the common noun. The States, united and several, constitute a state ; but the individual States are not states. This view is at least consistent with much of earlier juristical opinion. See *Martin v. Hunter*, 1 Wheaton, 304, 323, 352 ; and the greater part of that referred to, as presenting the true doctrine, in *Story's Comm. B. iii. ch. 3* ; and, as presenting the false doctrine, in *Baldwin's Const. Views*, pp. 13-17.

It will not be here attempted to state any other theory as being, in all points, supported by this or that publicist. The bulk of juristical authority is unquestionably in favor of the doctrine that at the Revolution the States became each a several and individual political state, nationality, or complete sovereignty. Compare 3 Dallas, 199 ; 4 Cranch, 212 ; 19 Howard, 502 ; *Life of Elbr. Gerry*, vol. i. p. 139 ; *Sims' case*, 7 Cushing, p. 275, 317 ; see also, *Gibbons v. Ogden*, 9 Wheaton's R. 187 ; 1 Tucker's

§ 347. The geographical dominion of any possessor of sovereign power, is, in jurisprudence, determined in the same manner as the seat or investiture of that power; that is, by the actual exercise of that power, in reference to certain territory. The exercise of such power being essential to the existence of law, regarded as the rule proceeding from the holder of that power, its legitimacy is a political question and not a legal one,

Blackstone, App. *passim*; 1 Calhoun's W. p. 190; Baldwin's Const. Views, pp. 75-81. In connection with this doctrine, it is maintained by some, that, by the adoption of the Constitution a perpetual grant, cession, or absolute transfer of a portion of the sovereign powers of each State was made, and that the powers now held by the Government of the U. S. are possessed, as of inherent right, either by that Government or by the people of the U. S. regarded as one political body; the residue of power being held by each State severally, and as before. Apparently so in Dred Scott's case, 19 Howard's R. 441, opinion of the court; see also, 1 Curtis' Hist. of the Const. 881.

Under another theory, the States or the people of the several States are regarded as still continuing individually sovereign states in the fullest sense; and as continuously and presently delegating a portion of the sovereign power, still inherently possessed by them, to a jointly deputed government adapted to certain common interests and objects. Under this theory the Constitution is regarded as the written evidence of a treaty, compact, contract, league, federative union, &c., between sovereigns each severally having power to judge of the nature and obligation of that contract, and to terminate its duration and effect upon itself according to its several autonomic judgment; limited only by such principles as may limit the action of all sovereign states or nations. See, especially, Calhoun's Works, vol. i. p. 161, iii. 149. Resolutions and Speech in Senate, Feb. 26, 1833, in vol. ii. 262, and in the same vol. p. 84; Report of Committee in S. C. Convention, Nov. 24, 1832. Baldwin's Const. Views, *passim*.

This theory of a league or federative union may have modifications, under different views of the nature or obligation of the contract and grant; all, with greater or less consistency, agreeing in ultimately placing an entire national sovereignty in the people of each State, severally. Compare debate in U. S. Senate on Mr. Foot's resolution, in 1830; 4 Elliott's Debates, p. 315-330; 3 Webster's Works, p. 248, 270; Story's Comm. § 321 and the references; De Tocqueville's Democracy, &c., part 1, ch. viii.; 1 Tucker's Bl. Comm. App. pp. 65, 175, 187.

Another theory, the extreme opposite of that last stated, appears to have had its advocates. This regards the United States or the people of the United States, as a pre-existing political unity, independently of the Constitution, holding the entirety of ultimate sovereign power, and supposes the States or the several *people* of those States to hold their several powers by the will or consent of the whole people or nation, or by public law emanating from that integral possessor of undivided sovereign power, and expressed in the Constitution. See Dane's Abridgment, § 2, p. 10, &c. Judge Story, citing this authority, seems to have inclined to the same view, though contenting himself with opposing the doctrine that the States are severally sovereign; Story's Comm. B. III. c. 3, and the copious references to leading opinions.

These two theories have this point of resemblance, that the present location of the ultimate sovereignty is, by each, considered the same which had existed from the first moment of separation from Great Britain, viz., originally, and now, ultimately, in the nation; or originally, and now, ultimately, in the States severally. (1 Calhoun's Works, 162-165, calling the Constitution a change of organization only.)

Further, these two theories would be equally supported by the doctrine assumed by many as an axiom, that sovereign power, to be such, must of necessity be ultimately found concentrated or centralized in some one political unity; either a single person, or a collection of persons acting as one. (1 Calhoun's Works, p. 122, 140.)

except in connection with public international law, which is law only in an imperfect sense.<sup>1</sup>

The colonies which formed the States of the American republic at the period of separation from the British empire were thirteen; viz., Virginia, Maryland, Massachusetts, New Hampshire, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, North and South Carolina, and Georgia. At that period the boundaries of some of these States under their colonial patents and charters were unsettled, and the claims under the patents, in many instances, conflicting. Under the political relations of the States bearing these names, these claims have been adjusted and their boundaries settled as they are at present. Portions of Virginia, New York, and Massachusetts have, with the consent of those States and of the national government, been organized as the several States, Kentucky, Vermont, and Maine; with like investiture in the political people of each as in the people of the other States, of a several possession of sovereign powers for local or State purposes, and of other sovereign powers in common with the people of the original States for national purposes. The remainder of territory not included within the present limits of the claimant States was ceded by them to the United States or the people thereof, with all rights of sovereignty over the same, though in certain cases with stipulations, the effect of which will be hereafter noticed. This territory consisted of all that district west of the thirteen original States, and, exclusive of Kentucky, as far as the Mississippi river and the eastern limits of the French province of Louisiana, bounded on the north by the British possessions lying on the St. Lawrence and the great lakes, and on the south by the Floridas, then belonging to Spain.

§ 348. In addition to this territory ceded by the several States, the United States have acquired by treaty or conquest, legalized, so far as treaties and conquests can be said to be *legalized*, by international public law—the territories completing the geographical dominion now known to the rest of the world as that

<sup>1</sup> Luther v. Borden, 7 Howard, 56.

the United States. Whatever doubt may have originally existed as to the power of the Government created by the Constitution to make these acquisitions for the United States, their present title or sovereignty in those territories must be taken to be legal and perfect.

It may be assumed that under that division of the sum of sovereign power which is made in the Constitution, every several State or the people of any several State are precluded from that external exercise of political power by which, under public international law, territory is acquired or political dominion geographically extended. The power then, which must still exist, necessarily belongs to the people of the United States or the integral nation. Hence, on the acquisition of territory by the national Government, it was the dominion of the integral people of the United States, not that of the several States, which was extended; having the same effect as in the territory ceded by the original States. This dominion was, of necessity, by the exercise of the sum of sovereign powers; that is, both the powers vested in the national Government by the Constitution, which have like extent throughout the entire domain of the United States, and the powers which, in a State, are exercised by its several people.

§ 349. In the territory thus held by the United States, whether ceded by the older States or otherwise acquired, this absolute or undivided sovereignty has existed until by the will of its possessors—the people of the United States, (indicated by their only known instrument, the national Government,) a political people has been recognized in certain districts of that territory, and that people has, as a corporate political body, consented to assume and have been declared by Congress to hold, in and for a particular district, the sovereignty held by the people of a several State under the Constitution; that is, a certain share of sovereign power to be exercised severally within the limits of such district, thereafter to be known as a State, and the residue of sovereign powers to be exercised in union with the other States. By which act the political people of these districts has become added to the *constituting* people of the



United States, that is, to those from whom the Constitution the United States derives its vitality. Hence the admission new States, formed within the territory of the United States, may, from the moment of such admission, be regarded as an autonomic development of sovereignty, and not an act taking place under law in the ordinary sense.<sup>1</sup>

§ 350. Within the entire national domain of the United States sovereign power is exercised either together by the political people of a State, being one of the United States, and the integral people of the United States, or else by the people of the United States, solely ; and no law can be recognized within the domain which does not derive its authority from one of these sources.

The "people" of the United States and of the new States, though claiming to hold their collective powers by right antecedent to all positive law, being a body existing through custom and prescription, are always (in the legal point of view) distinct from any collection of persons, however large even though of citizens<sup>2</sup> and electors, when acting in any of

<sup>1</sup> This formation and admission of a State of the United States is the action of parties, two political persons, exercising certain powers as sovereign. It is an economic contract or agreement, above positive law, (law in the ordinary sense, under it.

The will of one, the new State, is that of those who, in a corporate capacity or as political person, would become the political people of the new State at the moment of its existence. A method for ascertaining their corporate will may have been indicated under some law for the exercise of the electoral franchise by the individual constituents. Its requisitions may have been complied with. But (if it is stated that the will of this people and the will of the majority of the individual constituents are identical) the result (a vote) may or may not accord with the will of the corporate people. For this people, or a majority of them, may have declined to execute their will under the law.

To all persons who do not represent these two parties in their autonomic action, the result under the law is conclusive. Such persons are bound to find the will of the corporate people in the resulting vote, and to recognize no other indication of that will.

But the other sovereign party—the United States or those who represent the this autonomic action—Congress, (and the less so if they made the law,) are not bound under law. They may regard better evidence of the will of the party they are compacting with ; if any there be. For here they are autonomic.

That evidence might be found in criminal acts ; in acts of violence, wrong, outrage. But if it should be more indicative of the will of the other party, (the people of the future State,) than the vote under law, Congress may with perfect consistency disregard the latter.

<sup>2</sup> Dred Scott's case, 19 Howard's R., 404. Opinion of the Court, "The 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the



mode than those known to these Constitutions and the laws and usages which have been established or confirmed under them, even though those persons should be a majority of the electors of the whole mass of the electors.<sup>1</sup> The present powers of this "people" are vested by political changes, established by autonomous force, and legitimated only by their peaceful and uninterrupted continuance.<sup>2</sup> The rights of this "people" are not, in any legal sense, dependent on the theory of natural society or the consent of individuals as natural persons. All within the actual geographical limits occupied or held by them and the nation which they claim to represent, are each, however, free in legal condition, absolutely subject to their authority; without regard to any assent or acquiescence, express or implied.<sup>3</sup>

'Sovereign people' and every citizen is one of this people, and a constituent member of this sovereignty." The term *citizen* may unquestionably be properly thus employed, because this is one of the senses in which it is vernacularly used. But it is equally true that it may be properly employed where it cannot have this signification.

In the same opinion it was, however, held that the individuals constituting this "sovereign people"—"the political body," &c., are not known by their possession of the elective franchise. For after concluding that a negro is not a citizen of the United States, it is said, p. 422, "Undoubtedly, a person may be a citizen, that is, a member of the community who form the sovereignty, although he exercises no share of the political power, and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote, \* \* \* yet they are citizens."

The various meanings in which the term *citizen* may be used, and in which, it is herein held, it is used in the Constitution of the U. S., will be considered in some of the succeeding chapters.

<sup>1</sup> As matter of law, strictly defined, this is a necessary conclusion; and, hence, that a Constitution cannot *legally* be changed, except in such manner as may have been in the same Constitution provided. But, the possession of sovereignty being a fact, and not the result of law, it is evident that a new Constitution may, at any time, become operative, independently of the provisions of the former. However, the establishment of such a Constitution would, strictly speaking, be a revolutionary act—an act above all law.

<sup>2</sup> *Luther v. Borden*, 7 Howard, U. S. Rep. Elisha Williams in report of N. Y. Const. Convention of 1821, p. 248. Webster's Works, VI., 217; Calhoun's Essay, 1 Works, pp. 169, 188.

<sup>3</sup> Story's Comm., §§ 327—330.

Memoirs of F. Perthes, vol. II., p. 285. (Liberalism and the Political Constitutions of Germany, 1822—1825.) "The constitutions desired were rather to be the offspring of that political understanding which is always and everywhere the same; accordingly they were not to presuppose the existence of any established authority, and were to be for all nations essentially alike. To liberalism of this sort, Perthes was a decided opponent. He wrote: 'Men must be governed, and they wish it too; but as they can be governed only by men, every government must depend on some human accessory, be it a seneschal or a scullion, a major's wig or a corporal's staff. It is useless to fret and kick against the pricks; and though you were to set up among us a political idol from France or America, it would only be a new Baal, that would burst when his time came.' Again, 'you consider the *exclusive majesty of the law*, a phrase of noble and profound import. Yes, indeed, it sounds fine in the ears of our age, but profound

§ 351. The power held by the "people" of the several and United States is of the highest class of power known to human laws. It is the same power as that which formerly resided, & to the same territory, in the colonial Governments and the parliament and king of Great Britain, and is absolute as the supreme national power in any community. It is power superior to all law; unless it be those principles which have been called the law of nature, natural justice, natural reason, &c., and even practically considered, superior to those principles; since it is amenable to no tribunal for disregarding them, except as they may be vindicated in public international law. It is of the same nature as that of the English parliament, when it is said of it that it can do any thing, not absolutely impossible, and superior to it, if that of parliament be controlled by common law; not being constitutional power, but power above the constitution.

If any rights can be said to be vested in individual members of the nation independently of political sovereignty, whether they be the same as those held by private persons before the Revolution or not, they rest as *legal* rights, within the jurisdiction of this "people," on their acknowledgment of them as their highest guarantee or sanction.

"None on earth, neither people nor monarch, neither all, many, few, or one, have a right to do what they like. None, not even unanimous millions, have a right to do what is unjust."<sup>1</sup> Natural reason, right, or equity is unalterable. But if it be violated here, by this sovereign will, there is no power known to the *law*, that can resist its decree, nor any judicial tribunal that can overrule its commands.<sup>2</sup>

it is not: it is nothing in fact, but empty sound, for majesty of the law without authority of the lawgiver is mere nonsense. Majesty must have a body, monarchical or republican, as you please, but a body; and law presupposes an authority not made, but previously existing: which is precisely what our whimsical age is ever denying in one form or another."

<sup>1</sup> Lieber, Pol. Eth., B. II., § 133.

<sup>2</sup> Harvey and others v. Decker and Hopkins, 18 Walker's Mississippi R. 36, and Wheeler's Law of Slavery, 343. Otis' Rights of the Col., 1 Am. Tracts, p. 12. J. Q. Adams in an oration July 4th, 1831, (1 Story's Comm., p. 145, n.,) denied that "an absolute, uncontrollable, irresistible and despotic power" is essential to sovereignty, or that the doctrine was admissible in the jurisprudence of the United States. The question is nearly the same with that of a natural law in general jurisprudence. See *ante*, §§ 8-8, and of the power of parliament over common law, *ante*, § 131.

## CHAPTER XII.

### CONDITIONS OF FREEDOM AND BONDAGE CONSIDERED WITH REFERENCE TO THE PUBLIC LAW OF THE UNITED STATES.

§ 352. It was observed in the previous chapter that in every state or nation there must be some natural persons who are to be considered as actually holding, using or enjoying the power or right of the state, or of society, to create rules of action for the individual members of the state or nation, and some whose liberty of action is to be regarded as being determined by those rules.<sup>1</sup> This *right* of action in the first class of persons, or the *fact* of their holding this power, is said to be *determined* by the public law of the state ; but that which is here called *law* has rather the character of a law in the secondary sense, or of a mode of action, than of a law in the primary sense, or that of a rule ; since the *fact* is the judicially recognized *origin* of all rules of action having coercive force upon private individuals. This right of action in this class of persons in a state, though it may in a certain sense be called a right or liberty, is then, strictly speaking, above law ; since it is presupposed in the judicial recognition of every coercive rule, and referred to as being the source of its authority. The action which is contemplated by this so-called public *law*, being political or connected with the very existence of the state, the right of action may be called *political liberty*. That liberty of action which is determined by the law proceeding from those who possess this political liberty, since it exists in social relations, or the ordinary relations of

<sup>1</sup> *Ante*, § 336.

private persons under a civil state, may be called *social* or *civil liberty*; and the law which creates this liberty may be more properly called private than public law, since it affects persons in private relations, or establishes relations between persons having a private capacity or condition.<sup>1</sup>

§ 353. Although that which is here denominated political liberty must, necessarily, in every state be vested in or enjoyed by some determinate persons, there may be great differences of fact and law between various states in the distribution of that right or power of action. In some states it may be found to be possessed by a proportionately large number of those who also, by the private law, enjoy civil liberties. But, the larger the proportionate number of those individuals who possess this right or power, the less probable does it become that its possession by any one of those individuals should be independent of any external will, or should be a right above law; and the more probable will it be that the right or power, here called political liberty, will acquire a *legal* character, like that of the right called civil liberty, by being dependent on the will of a person, or number of persons, distinct from the individual holder of the right. Where a large number of persons are equal, or nearly equal, in their possession of this right, that equality can hardly be otherwise manifested than by accepting the will of the whole body, or of certain parts or proportions of the whole number of individuals, as the expression of the supreme or sovereign will. In that case the possession of this right by any one individual is founded on a will superior to and distinct from his own; and

<sup>1</sup> Rogron, Code Civil Expliqué.—Lib. I., tit. i. c. i. "Les droits de l'homme en société sont politiques ou civils. Les droits politiques sont les droits dont les citoyens jouissent par rapport au gouvernement, et qui leur permettent de participer à la puissance publique; savoir, de voter dans les assemblées electorales, d'être élus et admissibles à tous les emplois, à toutes les dignités, etc. Les droits civils, sont les droits ou certains avantages dont les citoyens jouissent entre eux et qui leur sont garantis par la loi civile. Les principaux sont le droit de puissance paternelle, ou maritale, tous les droits de famille, ceux d'être nommé tuteur, de succéder, de disposer de ses biens et d'en recevoir par donation entre vifs et par testament. Les droits civils se trouvent particulièrement énumérés dans l'article 25."

Lord John Russel, in his Essay on the History of the English Government, distinguishes civil, personal, and political liberty. This distinction might be proper when the existence of a class of persons, not enjoying personal liberty, is recognised by private law.

therefore, as to him, or regarded as the right of a natural person, it is the result of a law in the strict sense ; although the possession of the power by the collective mass of which he forms a part is anterior to all law in the strict sense. In this instance political liberty is a legal right of a private person ; though existing by public law.

In other states, that right of action, which is here called political liberty, may be so enjoyed by a few or by one, that those few or that one must be regarded as individually identified with the state, or the supreme source of law, independently of any other person or persons ; and political liberty, not being exercised by any who are individually subject to the state, or to those who possess its power, must be said to have no *legal* existence ; that is, though the right must exist somewhere, it is not created by law in the primary sense. The possession of the right is said to be ascertained by public law, but by *law* only in the sense of the statement of a fact or condition.<sup>1</sup>

§ 354. There is then a distinction in the mode of existence of political states which is more material, in determining the nature of freedom in those states, than any derived from those differences between *forms of government* which distinguish them as republican, monarchical, aristocratic, democratic states. This distinction is founded on a difference in the location of the ultimate sovereign power ; and by it all states can be distinguished into two classes, viz. :

*First* : Those wherein the ultimate sovereign power is by fact and law vested in the nation at large, or in individuals of that nation, who are at the same time politically and legally, as individuals, the subjects of that power.

*Second* : Those wherein that power is by fact and law vested in a single individual, or in a limited number of persons, distinct in political and legal relations from the body of the nation, and not individually subject to any other law, in the strict sense, than that proceeding from themselves.<sup>2</sup>

<sup>1</sup> In jurisprudence, the location of sovereign power is a question of fact. In an ethical view, the fact is according to the moral judgment of the observer. Compare the method of reasoning in Lieber's Political Ethica, B. 2, ch. 6.

<sup>2</sup> Lieber's Pol. Eth., vol. 1, p. 404, note citing Arist. Pol. iii. 7, 1 Ethica, viii. 12,

§ 355. The name *republic* or *commonwealth*, which has been applied without much discrimination to many very various forms of a state, can with propriety be given only to states of the first class above described. In those of the second class, the state power, or the sovereignty, has a private character, the nature of a private right; though above all rights conferred by the law in its ordinary sense.<sup>1</sup> If by the *constitution* of a state is meant merely the legal recognition of the existing investiture of sovereignty, a state of either class may be said to have a constitution; but in those of the second it will be only equivalent to the simple *fact* of the possession of sovereign power. In the first class of states only, it acquires the character of a law; since each individual, participating in the possession of supreme power, or enjoying this political liberty, holds that political right by the expressed will of an integral sovereign personality, to which he is subject. In such states, therefore, there is a true *law*, coexistent with the *fact* of the investment of sover-

vol. II. p. 64, A. B. Casaubon. M. De Tracy's commentary on Montesquieu's *Spirit of Laws*; Phila. 1811, page 12: "Confining myself, then, wholly to the fundamental principles of civil society, disregarding the difference of forms, neither censuring nor approving any, I will divide all governments into two classes, one of these I will denominate *national*, in which social rights are common to all (*nationaux* ou de droit commun); the other special, establishing or recognizing particular or unequal rights.

"In whatever manner governments may be organized, I shall place in the first class all those which recognize the principle, that all rights and power originate in, reside in, and belong to, the entire body of the people or nation; and that none exists but what is derived from and exercised by the nation; those, in short, which explicitly and without reserve maintain the maxim expressed in the parliament of Paris, in the month of October, 1788, by one of its members, namely, . . . *Magistrates, as magistrates, have only duties to perform* (n'ont que des devoirs); *citizens alone have rights* (les citoyens seuls ont les droits); understanding by the term magistrate, any person whatever who is invested with a public function.

\* \* \* \* (p. 13) "On the other hand, I call all those *special* governments, whatever may be their forms, where any other sources of power or rights, than the general rule of the nation, are admitted as legitimate; such as divine authority, conquest, birth in a particular place or tribe, mutual articles of agreement, a social compact, manifest or tacit, where the parties enter into stipulations like powers foreign to each other," &c. See this distinction adopted by Lanjuinais' *Constitutions*, tom. II, pp. 13, 14.

See also Sir William Temple's *Essay on Government*, p. 2, and a somewhat similar distinction by Grotius, B. et P., L. i., 3, 12, L. ii. 6, 3, between *regna patrimonialia* and *usufructualia*; rejected by Heineccius, J. Nat. et Gen., L. 2, c. 7, § 147.

<sup>1</sup> P. A. Jay, in Report N. Y. Const. Conven. of 1821, p. 200.

Acts of Vienna Congress; June, 1820, art. 57. "As the German Confederacy, with the exception of the free cities, is composed of sovereign princes, so must in consequence of this fundamental idea the collected power of the state remain united in the

eignty, which is the cause of the law.<sup>1</sup> The public law, which is mainly a law in the secondary sense,—the statement of a fact, or of a mode of action, and the private law, which is mainly a law in the primary sense,—a rule of action, here become, to a certain degree, identified. Only in this class of states can it be said that the constitution of the state establishes political freedom, or political liberty, as the right of an individual subject or citizen ; and in such States, this liberty, though a private right, regarded as attaching to that individual, exists by public, rather than by private law.

§ 356. Freedom of the individual in social relations, or civil liberty, according to the definition above given, which is freedom by private law, may evidently vary greatly in its nature or quality of privilege ; since it may include a greater or less variety of rights of action in those relations. This freedom must, to some degree, exist in every state ; since rights of persons arise in every relation established by law. When the idea of political liberty, as above defined, is excluded from the definition of civil liberty, it is evident that any degree of civil liberty which can practically exist in one of the above described classes of states, may also exist in the other. But in neither class of states, more than in the other, does any particular degree of this freedom *necessarily* exist ; because in each it depends directly upon the will of a sovereignty personally distinct from the individual subject. But in the first class of states,—while it is equally dependent on the sovereignty of the nation,—the more general the extent and security of political freedom, or the more widely *national*<sup>2</sup> the constitutional sovereignty, the more probable is it that a high degree of civil liberty will be found to accompany political ; or to be possessed by those at least who by

ruler of the state, and the sovereign by the constitution can be bound to co-operate with the chambers, only in the practice of definite rights."

Art. 58. The sovereign princes united in the confederacy shall be hindered or limited, in their federal obligations, by no provincial constitution.

North Brit. Rev., Aug. 1855, p. 229, Am. Repr.—"Our position, that in every mediæval state the governing body had a *locus standi* of its own which it was constitutionally entitled to defend against the public will," &c.

<sup>1</sup> Lex facit quod ipse sit Rex.—Bracton, L. 1, fol. 5 ; L. 3, fol. 107.

<sup>2</sup> *National* not being here used in distinction from *federal*, as in the preceding chapter, but in distinction from *private* or *special*, as those terms are employed by M. de Tracy in the note on the last page.



the public law possess political liberty ; since in this class of states, the public law gives to the subjects of private law, or to a large proportion of the subjects of private law, the right to participate, in a greater or less degree, in making that law.<sup>1</sup> Civil and political liberty, as rights of persons, according to the definitions here given, are therefore intimately connected, though not necessarily coexistent. And it is only in states of the first class that civil or social liberty can have a constitutional foundation ; that is, an existence connected with the public law.<sup>2</sup>

§ 357. In a state of the widest national basis, or most popular constitution of sovereignty, wherein political rights are most widely and equally distributed, the liberty of the individual subject or citizen is ever in fact dependent by public law on the will of the majority of those who equally share those rights ; though his equality in the possession of political power is a bulwark to each one against a diminution of his civil liberty by that will.<sup>3</sup> In every state the more intimate the connection between the possessor of sovereignty and the mechanical Government, or the instruments of the ordinary government of the state, the greater must be the facility for a legal invasion of the liberty of the individual subject, as previously recognized by law ; or the easier the process by which the law, public or private, which defines his rights, may be changed. In states of the second class, this connection is absolute identity ;<sup>4</sup>

<sup>1</sup> Penn's Preface to his frame of government for Pennsylvania, 1682. Marshall's Life of Washington, 1 vol., note iv. "Thirdly,—I know what is said by the several admirers of monarchy, aristocracy, and democracy, which are the rule of one, a few, and many, and are the three common ideas of government when men discourse on the subject. But I choose to solve the controversy with this small distinction, and it belongs to all three, any government is free to the people under it (whatever be the frame) where the laws rule and the people are a party to those laws, and more than this is tyranny, oligarchy, or confusion."

<sup>2</sup> Lanjuinais' Constitutions, t. 1, p. 97, "S'il n'y a des lois constitutionnelles, ou de moins politiques, les droits privés, pour les quelles tout existe, n'ont point de garantie."—This is his translation of Bacon's—*sub tutela juris publici latet jus privatum*.

<sup>3</sup> M. Benj. Constant ; Coll. des Ouvrages Politiques ; Paris, 1818, Tom. 1, p. 174, n. "M. de Montesquieu, comme la plupart des écrivains politiques, me semble avoir confondu deux choses, la liberté et la garantie. Les droits individuels, c'est la liberté : les droits sociaux, c'est la garantie. L'axiome de la souveraineté du peuple a été considéré comme un principe de liberté ; c'est un principe de garantie. Il est destiné à empêcher un individu de s'emparer de l'autorité qui n'appartient qu'à l'association entière ; mais il ne décide rien sur la nature et les limites de cette autorité."

<sup>4</sup> The form of government becomes merely what has of late been denominated *bureaucracy*. See Lieber, Civil Lib. and Self-Gov., vol. I., p. 182, and Polit. Eth. vol. I., p. 397.

but in those of the first class, or of the *national* character, the more widely *national* the possession of sovereignty, or, the larger the actual and relative number of the persons holding political rights, and the greater the equality of those rights, the stronger is the natural necessity for a *Government*, i. e., a politically organized instrument of government, distinct from the *national* possession of original sovereign power, though dependent upon it for its existence. In such states the word *constitution* has a more extended meaning than it can have in the public law of states of the other class ; since it includes a law in the strict sense, under which the Government is constituted ; and by determining the connection of that Government with the ultimate sovereignty of the nation, the constitution, in this case, gives to the political liberty of the individual still more of the nature of a legal right. Since such a state is republican, by the existence of political freedom, as the right of individual members of the nation, under *law* properly so called, the Government in this case is republican, whatever its form, when the political right of the individual subject continues to be exercised, in manifesting the supreme national will, independently of the legislative power of such constituted Government, which can only be in the ordinary creation and continuance of the actual agents or instruments of government.<sup>1</sup> When civil freedom is made by the sovereign power independent of the mechanical Government, it acquires a constitutional character ; for it can only be infringed by a change in the constitution of the Government, or the public law under which that Government exists ; and in such a constitution there is a part which is truly private law, as well as public law.

§ 358. Since all rights of natural persons in a civil state are to be considered, in law, as finally dependent on the will of the sovereign power, it is of the first importance, in a legal view of

<sup>1</sup> Mr. Calhoun, in his *Disquisition on Government*, 1 Works, p. 8, considers that *the Government* is in all instances necessarily identical with the original possessor of national or sovereign power, though he there speaks of the possibility of a constitution controlling such a Government ; and, on page 12, of the right of suffrage as a power above that of the Government. In his *Essay on the Constitution of the U. S.*, he speaks of the sovereign power as being in "the people."

freedom or its opposites in any state or nation, to exhibit the rights in which that freedom or the obligations in which those opposites consist, in their connection with or dependence on the public law of the state. Those rights which constitute political liberty (though private in attaching to private persons—the subjects of private law), are properly described as effects of public law ; but in exhibiting the foundation (duration, extent, legal necessity) of those rights which constitute civil liberty under private law, not only must the relations established by that law be shown, but also the dependence of that law upon the public law of the constitution of the state and of its Government.

In those states wherein the supreme power or sovereignty is of a private nature, as before defined, there is little or no room for any consideration of this kind ; since all laws, affecting the civil or social rights of the subject of the state, proceed from a political authority entirely distinct from and superior in its existence to any of his legal rights. In states wherein the sovereignty has any thing of the *national* character, where all rights of private persons may have to a greater or less degree a recognized co-existence with the sovereign power, the law of those rights has a more complicated nature ; being both public and private law. The legal nature of those rights which constitute civil liberty necessarily becomes still more complicated under a state, of this class, wherein the sovereign powers, inherent in a state or nation, are divided or are invested in severalty.

§ 359. The present Constitution of the United States being recognized to proceed directly from the legitimate and supreme source of power, its provisions become the highest rule of law in determining the relations of all persons and things which can be affected by them.

The Constitution has a twofold aspect :

*First*,—which has been already considered—it is a declaration of the location of sovereign power in the people of the United States as one, and in the people of the several States as separate polities ; equivalent, legally, to the evidence of a pre-

existing fact, to be recognized judicially as the *basis* of public and private law.

*Second*,—it is direct legislation, by the exercise of the sovereign powers held by the people of the United States as a political unity, and is either public or private law.

The public law is that which constitutes the Government of the United States,—creating thereby a source of private law ; and those provisions which create relations in which the several States or the Government of the United States are, in their political capacity, the subjects of rights or obligations.

The private law of the Constitution is contained in those provisions which create relations in which private persons are the subjects of rights or obligations anterior to and independent of the legislation and powers of the national Government, and render those relations independent of the powers held by the several States.<sup>1</sup> Therefore, although the subject of examination,—the condition of persons in respect to freedom and its opposites, is a department of private relations, and belongs strictly to private municipal law, as before defined,<sup>2</sup> the necessary subjection of that law to the power of the state renders a preliminary reference to the public law of the Constitution necessary, to determine the sources from which laws affecting those relations may originate, and the reciprocal limitations or restrictions on those sources of law, in respect to their extent or jurisdiction, as an essential element of the condition of persons subject to the law proceeding from them.

§ 360. Whatever may be the true doctrine of the essential political existence of the people of the United States, it must be taken as the first principle of public *law* (the law in the

<sup>1</sup> Mr. Calhoun, 1 Works, p. 191, &c.,—distinguishing between “the constitution-making and the law-making powers”—appears to have held that the Constitution of the U. S. has nothing of the character or operation of private law, or that it does not maintain, of its own force, any rights or obligations of private persons. Mr. Benton, in his Examination of the Dred Scott case, p. 14, &c.,—holding that the Constitution does not “act of itself anywhere, and that it required an act of Congress to put it into operation before it had effect anywhere,”—appears to hold the same doctrine. Mr. Benton cites Webster and Clay as being of the same opinion, and then shows that Mr. Calhoun held the contrary, in maintaining that, by the operation of the Constitution alone, slavery exists in all the *territories* of the U. S.

<sup>2</sup> *Ante*, § 25.

primary sense), proceeding from the rightful possessors of sovereignty that by the written Constitution they have created a Government, which, in the powers given it, is to be considered rightfully authoritative within the territorial limits of the dominion of that people. From an examination of the Constitution, in relation to this its effect, it is evident that the Government thus constituted or created is not the possessor of the sovereignty or supreme powers, which it may exercise, in consequence of an absolute political transfer of those powers from the people. This is shown by the fact that this Government is established in three distinctly organized parts, each holding one of the necessary and natural means or functions by which supreme powers are exercised: but neither, in itself alone, constituting supreme or sovereign power; which, to be such, must be uncontrollable not only in its ultimate effect, but also in the mode of its action. The legislative, judicial and executive functions, though each indispensable to the independent exercise of political power, and commonly designated as sovereign powers, are not such, properly speaking; but are the modes in which supreme and sovereign power is manifested. But since these, combined in their action, produce the effects of independent and absolute supremacy, the powers vested in the Government established by the Constitution, are, in their exercise and in the view of public law, supreme and of the nature of sovereign national power wherever existing; and they therefore act directly, and without reference to any other power, on all persons and things within their determined jurisdiction or territorial dominion.<sup>1</sup>

§ 361. These powers are not, in legal consideration at least, the less supreme or sovereign from being separated, in their exercise, from the other general powers of a national sovereignty, vested in the several states of the Union;<sup>2</sup> though in practice

<sup>1</sup> 1 Calhoun's W., p. 163,—that the Government acts as the Government of one nation, whatever theory may be adopted of the location of sovereign power.

<sup>2</sup> The Constitution of the U. S. is part of the whole law prevailing in any one State. And the Government of the U. S. and that of the State are equals and co-ordinates therein—each representing sovereign power. (1 Calhoun's W., p. 167.) But this is perfectly consistent with a national possession of those powers which have been

it may sometimes be otherwise. The Constitution does not, in making this division between the national Government and the several States, define the extent or full sum of all the powers belonging of right to a sovereign state or nation ; or all the power which such a state may rightfully exercise in restraining the action of private persons. And it is not here material to inquire whether the powers vested in the Government of the United States are the only powers belonging to the united people of the States as a preëxisting political unit ; or, in other words, whether the entire residue of sovereign powers, not granted to the Government, is, independently of the Constitution, ultimately vested in the people of all as one, or in the people of the States severally : this depending upon political theories of the antecedent political existence of the States, as before mentioned. It is sufficient in this respect for juridical purposes, that the tenth Article of the Amendments declares that “the powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively or to the people.” It has already been shown that since “the people” which in the Constitution appears as the delegating or constituting power had, as a matter of fact, existed in the political capacity of the people of distinct States, and, though united into one nationality, had always acted under forms recognizing such an existence, the powers which are thus declared to be reserved “to the people” must be held by the people in their several capacity, that is, by the several political persons or bodies known each as the people of a *State* of the United States, and these reserved powers can therefore, under the present Constitution of sovereignty, be exercised only by each singly in and for its own territory. This is the necessary inference from that recognition of the people which must precede the recognition of the Constitution.<sup>1</sup>

intrusted to the Government of the U. S. ; and it is not necessary to deny that the latter is the instrument of the integral American people, in order to maintain that the powers of the State government are equally sovereign in their nature, as is said by Mr. Calhoun, on p. 168 ; or to hold, with his speech in the Senate, 9th April, 1834, that each State has two Constitutions, i. e., that the State Constitution and the Constitution of the U. S., are Constitutions for the inhabitants by being both co-ordinately derived from the State, or the people of the State.

<sup>1</sup> *Ante*, § 343.

§ 362. There are, however, certain powers belonging to sovereign nationality, necessarily existing somewhere, which, if not granted to the Government nor prohibited to the States, can hardly be said to exist at all in the several States ; or, if existing, they are, by division, very different in effect from the same power used by the people nationally, or as one : a difference arising from physical conditions of territory and situation. For example, the power to acquire foreign territory and to exercise sovereignty over it. For if this power were not invested in the national Government, and if the States were not under the Constitution prevented from exercising it, yet their intrinsic power of acquisition under international law is very different in the hands of the nation acting as one, and in the same people acting as distinct states for that end. The same may be said of that right possessed by every national sovereignty, in some undefined measure, to change the *law of nations*, when applied in international law regarded as a rule of action for states, but as law in the imperfect sense.<sup>1</sup>

§ 363. The expression of the will of the supreme legislative authority, not that will itself, constitutes the *law*. From the very nature of sovereign national power, the law, or this expression, is always in a certain sense arbitrary, that is, dependent on that will. But in order that freedom, as the condition of a private person, subject to that will, may be said to have coëxistence with law, it is necessary that that law should be a rule of action already to some degree fixed, and not identified with mere arbitrary will.<sup>2</sup> In order that freedom and its opposites may be *legal* conditions, there must be a previous publication of the rules of action or the laws which can affect freedom of action. So far as liberty consists in a high degree of guarantee against arbitrary rule, in the sense of ruling without law, it is secured to all under the Constitution of the United States, in reference to the powers intrusted to the National Government, and, to a less extent, in reference also to the powers of the sev-

<sup>1</sup> See *ante*, § 38.

<sup>2</sup> "La liberté, c'est le droit de faire tout ce que les lois permettent."—Montesquieu.  
 "Libertas est potestas faciendi id quod jure liceat."—Cicero.



ates, by declaring the seat or investiture of all sovereign al power, the establishment of a judiciary, and its independence of the other functions of government.<sup>1</sup>

64. From the two-fold nature of the Constitution, in both the evidence of a fact and also the promulgation of of action, the question of the relative extent of the judiciary of the United States is one which is, perhaps, essentially indeterminable.<sup>2</sup> A law in the secondary sense—a state which exists independently of any superior cause or author, maintained in its own existence. The possession of sovereignty is proved by itself. The fact of that sovereignty does not result from a rule established by a superior but is proved in the actual possession or exercise of that power.

But to the vitality of a law which is a rule of action a judicial function is essential. The judiciary, where the investiture of power to promulgate coercive rules of action for private individuals is determined by a law in the primary sense, becomes the test of the extent of that power.

The Government of the United States derives all its powers from law, properly so called, contained in the written Constitution of the United States. The exercise of any powers by the Government is, therefore, a proper subject of judicial power proceeding from the authors of that law.

On the other hand the States, or the people of the several States, though not each severally possessed of all the powers of sovereignty, yet do, according to the view hereinbefore explained,<sup>3</sup> hold their powers by right above law, or by a law of their own existence, which is law in the secondary sense only, and the possession of those powers is only proved by the Constitution of the United States, as evidence, not derived from it as a law in the proper sense. But since the Constitution of

<sup>1</sup> If the several States create law by their sovereign powers, the judiciary of each (supposing a republican State Government to exist, having the judicial function to the State separately invested) decides on the validity of laws proceeding from the exercise of the state power.

<sup>2</sup> It is, its extent as compared with other judicial power, that proceeding from the States. The extent of the judicial power of the U. S. is described in the Constitution.

<sup>3</sup> Art. III. sec. 2.

See, § 346.

the United States is, in each State, the highest or ultimate rule of positive law for all natural persons not identified with the possessors of sovereignty,<sup>1</sup> the judiciary, in applying that law, must determine on the powers held by the several States under the Constitution. The extent of the powers of the State Governments is, therefore, also primarily,<sup>2</sup> a question under the Constitution of the United States falling within the judicial power.

§ 365. The declaration, that the Constitution of the United States is the supreme law in each State, proceeds from the author of the Constitution, the integral people of the United States. This declaration then has the force of law in each State by the will of the integral people of the United States, not by the several will of the people of the State. Now, to the existence of every *law*, a judicial function, co-ordinate with the legislative, is essential. If the law is supreme, that judicial function is supreme which emanates from the author of the law, otherwise the law would not be supreme. But the Constitution of the United States is confessed to be the supreme and absolute law, in either characteristic, (i. e., as a rule of action or evidence of the location of power) being based upon the will of the ultimate possessors of sovereign power. If so, the judicial power accompanying this supreme legislative rule, or proceeding from the promulgators of the rule, must also be supreme wherever that rule has extent.

The Constitution declares that the judicial power of the United States shall be vested in a certain judiciary,<sup>3</sup> forming part of the Government constituted by the possessors of ultimate sovereignty. The judicial power of the United States can be nothing else than the power to administer judicially that law which is the supreme rule declared by the constituent people of the United States, and the law being supreme the judicial

<sup>1</sup> Art. VI, 2d clause, "This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding."

<sup>2</sup> That is, when no reference is made to the State *constitution*, and when the question is, in fact, what are the powers of the constituent people of a State?

<sup>3</sup> Art. III., sec. 1.

power accompanying that law or derived from that people is supreme. And when in the first section it is said, "the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the congress may from time to time ordain and establish,"—though the word *supreme* cannot, in this connection, be taken to mean judicial supremacy *absolutely*, or in reference to all judicial administration of the national jurisprudence,<sup>1</sup> but evidently designates supremacy relatively to the co-existence of inferior courts clothed with the judicial power of the United States, yet, from the nature of the authority on which that jurisprudence rests, the highest judicial court created under this Constitution is supreme in all questions arising under the Constitution. Its supremacy being limited only by the fact that the possession of sovereign powers—those held by the United States and granted to a national Government on the one hand, and, on the other, those held by each State severally—is not the result of a *rule* contained in the Constitution, but is a *fact* proved by it.

§.366. The judicial function of the Government of the United States determines, therefore, the recognition of all coercive rules of action for private persons within the limits of the United States ; or, is the final test of all action of that Government affecting liberty or freedom of action, and of the limits of the powers remaining in the several States to affect it. That it has that extent is a necessary inference from the nature of the Constitution as *law*;<sup>2</sup> and with reference to this quality of the Constitution must the clause be construed which defines the extent of the judicial power, "The judicial power shall extend to all cases, in law and equity, arising under this Constitution,"<sup>3</sup> which

<sup>1</sup> Meaning all rules which derive their force from the national will, though they may be applicable by a judiciary deriving its power from one of the several States.

<sup>2</sup> Ency. Am. VII., (App. by Judge Story,) pp. 581, 582.

<sup>3</sup> The judiciary thus decides on the powers which may be exercised by the co-ordinate executive and legislative functionaries of the national Government, and by the State Governments; but only when the rights and obligations of private persons, as affected by those powers, come before it in a case. The judiciary cannot, from the nature of the judicial function, decide prospectively on the powers of the executive and legislature or of the State Governments. They must always, in the first instance, judge for themselves, 1 Kent's Comm. 7th ed. p. 497, 22d Lect. Curtis' Comm. p. 94. Benton's Examination of the Dred Scott case, pp. 3, 4. ;

must include questions of the location of power, so far as it is a thing *determined* by the Constitution as a *law* in the primary sense, or so far as it is distinct from that *fact* of the investiture of original power of which the Constitution is the evidence and not the cause.

Since an essential part of every judicial act is to recognise the supreme power which promulgates law, every judicial officer in the United States decides the constitutionality of any law, governing the case before him, as legitimately proceeding either from those powers which are vested in the national Government, or those remaining in a State. And since all acts of power proceeding from any person or political body who is not identified with the sovereign possessor of the original power of the state, must, within that state, be based on some law,—rule of action, and may be tested by the judicial function of the instrument of government, the decision of the supreme national judiciary is, to the individual, in any part of the United States, the rule of his obedience until one or the other of those possessors of original sovereign power, that is, the United States or the single State claiming local jurisdiction, by *action as a sovereign above law*, causes a different recognition of the source of law. If then it is supposed that a usurpation of the powers distributed according to the Constitution may occur, either on the part of the national Government or of a State, the question of usurpation or non-usurpation is, according to the highest *law*, now existing, to be determined, for the individual natural persons concerned, by the judiciary of the United States.<sup>1</sup>

§ 367. By the “judiciary” act of Congress, September 24, 1789, § 25,<sup>2</sup> which the Supreme Court has decided to be consti-

<sup>1</sup> Bank of U. S. v. Norton, 8 Marshall's Ky. R. 428; Braynard v. Marshall, 8 Pick. 196; Hempstead v. Reed, 6 Conn. R. 493; Commonw. v. Lewis, 6 Binney, 272; Ewbank v. Poston, &c., 5 Munroe's Ky. R. 294; Bodley v. Gaither, 3 of same, 58; Lessee of Jackson v. Burns, 3 Binney, 84.

<sup>2</sup> “Sec. 25. A final judgment or decree in any suit, in the highest court of law or equity in a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity, or where is drawn in question the con-

stitutional,<sup>1</sup> the power of testing questions of constitutionality by appeal from the State courts is given to the Supreme Court of the United States only when the decision of the State court is in support of an assumed exercise of power by the State, or contrary to the power assumed by the Government of the United States ; and the court is authorized to “ proceed to a final decision of the same and award execution.” But if the powers vested in the States, according to the Constitution, are actually sovereign and independent, the decision of the Supreme Court, in a supposed case of an actual usurpation of the powers of the States, confirming such action of the national Government, would still be usurpation ; and a decision against the assumed exercise of power by the State, in a case wherein the actual legitimacy of that power is supposed, would be usurpation in a negative form ; and it would be inconsistent with the admitted possession of its powers as powers of sovereignty, to say, that the State (i. e., the political person known as the State) is bound to limit its sovereignty by that decision. It would be denying State sovereignty altogether to say, that the decision of the Supreme Court would bind the State or the political people of that State (i. e., the integral political person known as such) in all supposable cases. It would be contradictory to say that a State of the Union possesses sovereign powers as an independent state, if an external tribunal has the right to decide finally what those powers are. What a State of the Union, as a political body holding sovereign powers, may rightfully do if its share of power is usurped in the name of *law as judicially recognized*, is beyond the scope of a *legal* view of the question, because the possession of sovereign power is a *fact* antecedent to *law*. All that can be said is, that so far as the *law*—the rule of action promulgated by the people of the United States in the Constitution—carries us, the individual, subject both to the local and the national sovereign powers, is, by the

struction of any clause in the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption, especially set up or claimed by either party, under such clause of the Constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error,” &c., &c., 1 Stat. at Large, 83 ; Brightly's Dig. 259.

<sup>1</sup> Martin v. Hunter's Lessee, 1 Wheat. 304 ; Cohens v. Virginia, 6 of same, 264.

highest known *law*, bound by the decision of the Supreme Court. The *law* can do nothing in disputes as to the possession of supreme powers between those claiming to be *sovereign* in the mode of their possession of those powers.<sup>1</sup>

§ 368. The extent of judicial power vested in the Government of the United States by the Constitution is described by the *cases* which it may reach, which are of two kinds.

*First*, all cases arising under certain *laws*; “all cases in law or equity arising under this Constitution, the laws of the United States,” (the legislative powers of the United States being vested in Congress by Art. I., sec. 1,) “and the treaties made, or which shall be made under their authority.”

*Second*, cases arising between certain parties, that is, cases described by the parties between whom they arise; “all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction,” (which jurisdiction attaches by the recognition of persons as being within certain geographical limits, or as holding peculiar relations towards the Government,) “to controversies to which the United States shall be a party, to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States and citizens thereof and foreign states, citizens or subjects.” This is modified, as to suits against any one of the States, by the eleventh article of the amendments;—“The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of any other State, or by citizens or subjects of any foreign state.”

These last provisions make no mention of the laws affecting those cases, and necessarily include the power of judgment under any laws which may affect those parties.<sup>2</sup>

<sup>1</sup> Compare Calhoun's Essay on Const. 1 Works, p. 240-244, and McKean, C. J., in 3 Dallas, 473.

<sup>2</sup> 1 Kent's Comm. 343.

§ 369. In considering that extent of the judicial power of the United States which is described by the clauses of the Constitution above cited, it is farther necessary to ascertain the meaning of the terms *a State* and *a citizen of a State*, as therein employed. In doing this, it is proper, in following the method herein adopted in such inquiries, first to refer to existing judicial interpretation of those terms, so far as it is to be found, and afterwards to compare such interpretation with general principles applied to the history of jurisprudence in this country.

The words whose signification, in this connection, is to be ascertained are *State* and *citizen*. With regard to the first, it has been held that it means (here at least, if not in every place where it is used in the Constitution) one of those corporate bodies or organizations which are known in the political system of the United States, as the "several States," and which, in the language of some jurists or publicists, are "members of the American Confederacy ;"<sup>1</sup> or, negatively, that "a Territory" of the United States, or such a political district as the District of Columbia is not a State within the meaning of this clause, and that, therefore, a citizen of such a Territory or district is not a citizen of a State under this clause.<sup>2</sup>

§ 370. This question of the meaning of the term *a State* arises in determining the rights and obligations of private persons, (incident to personal condition or status,) as they depend upon, or are created, or are enforced, by other clauses in the

<sup>1</sup> 2 Peters' R. 312; R. M. Charlton's Geo. R., 374.

<sup>2</sup> Hepburn v. Elzey, 2 Cranch, 452; question of the jurisdiction of U. S. Circuit Courts under act of Congress, and whether a citizen of the District of Columbia is a citizen of a State in view of those acts. But the Court, Marshall, C. J., argues the question as under the provision in the Constitution, concluding:—"It is true that as citizens of the United States and of that particular district which is subject to the jurisdiction of Congress, it is extraordinary that the courts of the United States, which are open to aliens and to the citizens of every State in the Union, should be closed upon *them*. But this is a subject for legislative not for judicial consideration." Of course, since the Court decided on the meaning of the Constitution, it was not intended to say that this could be changed by legislative action of Congress, unless by its proposing an amendment of the Constitution. The same doctrine in reference to a citizen of one of the Territories of the United States was asserted by the same court in Corporation of New Orleans v. Winter, 1 Wheaton, 91. And by State courts, Sturges v. Davis, N. Y. Supreme Court, Feb. term, 1826, mentioned in 1 Paine and Duer's Pract., p. 12, but not reported; Hoggin v. Squiers, 2 Bibb, (Ky.,) 334; Seton v. Hanham, R. M. Charlton's Geo. R., 374, where the meaning of the word *State* in Art. IV., sec. 1, was considered.



Constitution. And there is much that has the authority of juridical practice, if not of judicial opinion, to show that the term *State* has not, in the various instances in which it is used in the Constitution, been always taken in this restricted sense, while, at the same time, it would be difficult to show any reason (other than views of political expediency remaining unexpressed in the breast of the expounders) why the term should have been interpreted with more latitude in one instance than in others.

Since the meaning of the term *a State*, in those clauses which more directly affect personal condition, will require consideration in a later portion of this treatise, the further examination of the question will not be pursued here ; except in observing, that it will hereinafter be urged that the *interpretation* of the term may depend upon the proper *construction* of the clauses or provisions in which it occurs.<sup>1</sup> And that, under the construction of this provision, there is much reason for maintaining, (as has, in fact, by juridical practice, been maintained in reference to other clauses wherein the term occurs,) that the word *State* should not here be restricted to the organized "several States" alone, but that it should be taken to include those geographical jurisdictions, in and for which, under the government of Congress, is severally exercised that portion of the powers of sovereignty which in and for a "several State"<sup>2</sup> are exercised by the people of the State or by the State Government.<sup>3</sup>

§ 371. With regard to the term *citizen*, in this part of the Constitution, it has been held in the recent case of *Dred Scott v. Sandford*, (December, 1856,) 19 Howard, pp. 403, 427, that the question, "Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by

<sup>1</sup> It being supposed that construction and interpretation are each employed, of necessity, wherever the meaning of any written instrument is to be ascertained. The explanation of the distinction in the use of these terms must likewise be reserved for another place.

<sup>2</sup> Compare *ante*, § 348. And see *post*, § 397.

that instrument to the citizen, one of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution ?" must be answered in the negative. In other words, assuming that there are no persons of African or Ethiopian race or descent, now domiciled in the United States, except such as derive their descent, in whole or in part, from African negroes imported as slaves, it has been held in the above-named case, that the distinction of race, which has been set forth in some of the former chapters, is to be considered in determining the meaning of the term *citizen* in this clause of the Constitution ; and that, affirmatively, only whites, or persons of Caucasian race, can be such citizens ; or, negatively, that no person of African or Ethiopian race can be such a citizen.

§ 372. It will not be attempted here to examine the correctness of the proposition above stated : partly for a reason similar to that above given for deferring inquiry into the meaning of the term *State*, viz. : that the meaning of the word *citizen* must hereafter be considered in the exposition of rights and obligations of persons arising out of other clauses in the Constitution, more directly affecting personal condition, in which also the term is found.

It may, however, be observed in reference to the above named decision that the Court, or the several Justices sustaining that answer to the question propounded by Chief Justice Taney in the Opinion of the Court, seem to have *assumed*, as preliminary to their inquiry, that in this clause the term *citizen* is used in one of its meanings, (a sense which is not its only one in vernacular use,) that is, in the sense of a person enjoying a certain condition or status, manifested in the exercise of certain civil and political privileges or immunities.<sup>1</sup>

Now, as has been herein above suggested in reference to the term *State*, it is here supposed in reference to the term *citizen*, that the interpretation of the term may depend upon the con-

<sup>1</sup> See Opinion of the Court, pp. 403-425 ; Mr. Justice Daniel's Opinion, pp. 475-482, particularly p. 481, where the applicability of the other meaning of the term is noticed as having been urged, but at the same time it is summarily discarded.

struction of the clause or provision in which it occurs, and it is not necessarily concluded that the word has the same signification in every connection in which it has been employed in the Constitution ; that, here the question is not so much of a right or privilege in certain legal persons, to sue and be sued in certain courts, as it is a question of public municipal law, the distribution of jurisdiction or juridical power ; that the clause must be construed with reference to the international relation of the States or the several jurisdictions (several sovereignties) into which the entire dominion known as the United States of North America is divided, and with reference to the application of a law having authority as national-municipal but operating as international private law, (*quasi-international law* ;) <sup>1</sup> that the object of the provision (by construction) is to give jurisdiction for the application of that law, persons here called citizens in reference to that element in the definition of *citizen* which ordinarily determines questions of jurisdiction in the application of international private law, and that this element has no reference to the civil or political rights, (privileges and immunities of legal persons,) but simply to their quality of being legal persons, domiciled in this or that forum of jurisdiction. <sup>2</sup>

The Opinion of the Court does not go to the extent of saying, that no person of African race, descended from persons who had been introduced into the country as slaves, could be a citizen in this sense. Though there are passages in that Opinion and in those of some of the associate Justices which may be taken to lead to that among other unexpressed deductions.

In Mr. Justice McLean's brief examination of this question

<sup>1</sup> As will be further explained in the next chapter.

<sup>2</sup> Mr. Justice Curtis, in maintaining views of the personal extent of the clause different from that contained in the Opinion of the Court, seems likewise to have assumed that the word *citizen* refers to a condition of civil and political rights, and that it must be supposed to have the same meaning wherever used in the Constitution.

Whatever may have been the intention, the reasoning in the Opinion of the Court and in those of the Justices who most fully considered this question, seems to have no more direct bearing on the use of the word in the Fourth Article of the Constitution. It will therefore be more particularly noted herein, when considering the effect of the provisions in that Article upon conditions of freedom and its opposites.

**The case, his conclusion on this point seems to be expressed in the following, on p. 531 of the Report :—“ It has never been held necessary, to constitute a citizen within the act that he should have the qualifications of an elector. Females and minors may sue in the Federal Courts, and so may any individual who has a permanent domicil in the State under whose laws his rights are protected, and to which he owes allegiance. Being born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make him a citizen. The most general and appropriate definition of the term citizen is “ a freeman.” Being a freeman and having his domicil in a State different from that of the defendant, he is a citizen within the act of Congress, and the courts of the Union are open to him.”**<sup>1</sup>

§ 373. The extent of the judicial power of the national Government is thus to be ascertained from the Constitution of the United States. That of the judicial power in each of the States is determined not only by its own several Constitution but by the Constitution of the United States, which, in defining the powers of such several State, may be said to limit the State Governments in each function : restraining their power over the relations of private persons, not only by its express prohibitions, but also by its requisition or guarantee of a republican Government. The extent of this guarantee can only be determined by general principles of public law ; which, however, from the historical character of public law in every country, can, in this, be determined only from the history of jurisprudence in the British empire and in the United States.

<sup>1</sup> According to a newspaper report, copied from the Chicago Press of July 15, 1857, in a suit in the U. S. Circuit Court, by a colored man of Illinois against a citizen of Wisconsin, the defendant pleaded to the jurisdiction of the Court and averred that the plaintiff was a person of color, to wit, a negro ; but the demurrer was sustained by Judge McLean, saying, “ The Constitution and the act of Congress of 1789 give jurisdiction to the federal courts between citizens of different States. In the sense used, the term citizen may well be held to mean free man who has a permanent domicil in a State, being subject to its laws in acquiring and holding property, in the payment of taxes and in the distribution of his estate among his creditors or to his heirs at his decease. Such a man is a citizen, so as to enable him to sue, as I think, in the federal courts. The objection has never been made, so far as I know or believe, to his right to sue in this court, that he is not entitled to vote.”

## CHAPTER XIII.

CONDITIONS OF FREEDOM AND BONDAGE CONSIDERED WITH REFERENCE TO THE PUBLIC LAW OF THE UNITED STATES.—SUBJECT CONTINUED.—OF THE DISTRIBUTION OR CLASSIFICATION OF PRIVATE LAW, AFFECTING THOSE CONDITIONS, WHICH MAY BE MADE UNDER A REFERENCE TO PUBLIC LAW.

§ 374. It is farther necessary, in considering the connection of freedom and its opposites with the public law of the United States according to the distinction in that respect which was made in the last preceding chapter,<sup>1</sup> to ascertain the extent or jurisdiction of all civil or political powers within the dominion of the United States. The extent or jurisdiction of sovereign or political power, or, more properly speaking, of the law proceeding from that power, is either territorial (over certain territory and persons and things therein) or personal, (over persons individually, without regard to the territory in which they may be found.)

§ 375. The jurisdiction of the powers of the national Government is various ; being either, for certain purposes, over the territorial (geographical) dominion of the United States, whether States or Territories, and over all persons within that dominion, whether also subject to a State dominion, or to powers held by a State, or not ; or, for the same purposes and others, the nature of each of which will be hereinafter considered, over the Territories, the District of Columbia, lands which, though belonging to the United States, are not included geographi-

<sup>1</sup> *Ante*, § 359.

in the limits of a State dominion, or, being within one, are exempted from its jurisdiction, and over all persons and things therein exclusively. Congress has certain powers of legislation, some granted for certain purposes in absolute terms, as specific grants of power, and without mention of limits, which legislation has a national extent or jurisdiction without distinction of persons or places; and some granted for certain districts only, giving only a local jurisdiction. The judgment of the national judiciary is entitled to recognition and is to be enforced wherever the laws which it asserts have territorial or personal jurisdiction. The executive power has equal recognition, because execution accompanies the jurisdiction of the laws, the execution which is intrusted to it.

§ 376. The limits of the several States within which, under the Constitution, they or the people of each are to possess their separate share of sovereign powers, have been determined in some by the recognition of their ancient colonial boundaries and by agreements with the other States, or with the United States or the national Government; and as to others by legislation of Congress in their creation under the Constitution.<sup>1</sup> The territory not known under the geographical divisions of the several States (not being occupied by a people known separately in the public law of the country as possessing a separate share of sovereign powers which, by that law, is assignable only in the *people of a State* of the United States as a definite political person) must necessarily be under the exclusive sovereignty of the United States, or the united people of all States, in their integral and national possession of sovereignty. For the several States, which before possessed lands lying beyond their present State limits, have conveyed those lands with their right of dominion or jurisdiction to the United States, and under the Constitution of the United States a single State can perform those acts of national sovereignty by which territory may be acquired under international law. The nature of that

Art IV. sect. 3. "New States may be admitted by the Congress into this Union; no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of the Congress."

power which may be exercised over this territory by the United States, through their constituted instruments, must be determined by the natural or necessary law of nations,<sup>1</sup> as applied in public law to the action or mode of existence of sovereign states; or, by the reception, interpretation, or application of that law by the United States or by the national Government as their instrument; the latter being controlled in that respect by the Constitution, as the only legislative exposition of the mode in which any of the sovereign powers of the United States (i. e., of the people of the United States) are to be exercised.<sup>2</sup>

§ 377. From the existence of this division of sovereign national powers to create law between the Government of the United States and the several States, which has been set forth in the last preceding chapter, and from the difference in the territorial jurisdiction of the laws thus originating, which has been above considered, a distinction may be made in the municipal laws of the United States, as being either *national* or *local*.

The *national municipal law* of the United States thus distinguished is that which originates in the national sovereignty of the United States, (people of the United States,) and which has national extent and jurisdiction over all persons and things within the domain of the United States, whether States, or territory not organized under a State sovereignty.

<sup>1</sup> *Ante*, § 49.

<sup>2</sup> The doctrine of the Supr. Court, in *Dred Scott's* case, 19 How. pp. 447, 449, 451, Opinion of Court, and cap. 3, is that whether the power of Congress, or of the national Government, over the Territories is derived from the "territory-or-other-property" clause, (Art. IV, sec. 3,) or is a necessary result of the existence of that Government and of its relation to the States and the people of the U. S.—Congress or that Government is not sovereign in a Territory as the *people* of a *State* are sovereign within the limits of that State, but that it is, like a *State Government*, restricted by the law from which it derives its existence, and that there are clauses in the Const. of the U. S., which, in and for territory, have an effect similar to that of a Bill of Rights in a State Constitution.

Mr. Benton, in his *Examination* of this case, holds that the Constitution of the U. S. does not have any such effect as private law in the Territories; that no rights of private persons "can be exercised under it without an act of Congress." See his introductory note. The general doctrine of the Court may be admitted, and then the question is, whether the right of a master in respect to a slave (domiciled, before, in a slave-holding State) is a right protected by the Constitution, thus operating as a Bill of Rights and as private law. This is a distinct question, and on this Mr. Benton's *Examination* has but little bearing. His whole argument being that Congress has absolute unrestricted power in the Territories.



The *local municipal laws* of the United States are those which originate in the separate sovereign power held by the people of each State, or in the powers of Congress, for local purposes, within certain limited territory ; either of which last has only local or limited extent and jurisdiction within the limits either of such States or of such territory.

§ 378. Although this distinction in the municipal law is founded upon an *anterior* possession of sovereign powers proved or evidenced by the Constitution,<sup>1</sup> yet, since the Constitution is also itself a legislative act, and has universal prevalence and recognition in the States and in the territory belonging to the United States, as the supreme rule of positive law in public and private relations, so far as it can be applied to those relations, it must form a part of one of these divisions of municipal law ; that is, the national municipal law.

§ 379. Since the legislative or juridical exercise of sovereign power can have no independent force or authority beyond the territorial limits of the state or political body holding that power,<sup>2</sup> the local laws of the several States cannot have any independent extension or authority in the territory of another State of the Union, or in any local jurisdiction of the Government of the United States, nor can the local laws of districts, under the several jurisdiction of the Government of the United States, have any such independent extension and authority in the territory of any State of the Union, or of any other several jurisdiction under that Government.

§ 380. Though all positive law must be considered as operative within certain geographical limits, because always deriving its authority and coercive power from some organized political personality confined to certain limits by the natural or necessary law of nations, yet persons are always the objects of that law, and the relations of persons to each other and to things are its effects.<sup>3</sup> Laws may not only be distinguished from other laws as operating within various jurisdictions, but also as having different persons for their object, and may be distinguished ac-

<sup>1</sup> *Ante*, § 331.

<sup>2</sup> *Ante*, § 63.

<sup>3</sup> *Ante*, § 21.

according to the differences which they create between the persons upon whom they operate, as well as by their territorial jurisdictions ; that is, they may be considered in respect to their personal jurisdiction or as personal laws.<sup>1</sup> This distinction may also be made in the municipal law of the United States.

The laws created by the exercise of any sovereign national powers, held by any state or political body to have effect within certain territorial limits, may, or rather must, operate differently upon different persons within that territorial jurisdiction. The laws, proceeding from these sovereign powers, themselves determine, to a certain degree, their own different effect upon different persons. But there are certain general principles connected with the nature of sovereign power, or the conditions under which it is held by states and nations, which, in every jurisdiction, indicate a difference in the application of local laws to persons within that jurisdiction.<sup>2</sup>

§ 381. It was shown in the first chapter, that from the existence of separate possessors of sovereign legislative power, as public bodies or polities, having different territorial jurisdiction, and from the necessary conditions of human society and intercourse, they may, as separate polities, sustain relations towards each other in the exercise of that power. And from this necessity, incident to their existence, and from the fact that there may be some relations of persons to other persons, and some rights of action arising out of them, which cannot, under all circumstances, be maintained, as legal rights, by the distinct authority of any single possessor of that sovereign power, those maxims, or rules of action originate, which are called "international law."<sup>3</sup>

It is a circumstance incident to the nature of sovereign national power, and its distribution between various possessors, having, according to the mode of their existence, jurisdiction within certain territorial limits, that persons within that jurisdiction, or within those limits, may be distinguished as either native or alien subjects. The recognition of persons as aliens is

<sup>1</sup> *Ante*, §§ 26, 27.

<sup>2</sup> *Ante*, § 53.

<sup>3</sup> *Ante*, § 10.

the recognition, by the sovereign source of municipal law in that jurisdiction, of an international relation. The law which affects the condition of the alien is the international law and the municipal (national) law taken together ; because the recognition of a person as alien, and the discrimination of that municipal (national) law which shall be allowed to determine his relations and rights, (either that of his domicile or that of the jurisdiction in which he is an alien,) is itself international law ; or, what is to say the same thing in different words, that discrimination is judicially made, in the jurisdictions whose tribunals have personal control over the alien, according to principles which, from their application, are called a law *between nations*, or international law ; though they rest, for their legal authority and coercive force within any jurisdiction, on the sovereign power which is therein the source of municipal (internal) law.<sup>1</sup>

§ 382. This international relation between the possessors of sovereign national power and this recognition of persons in an international relation, may exist in reference to any one or more of the modes in which that power can be exercised. It may, therefore, exist between political bodies which, according to the conditions of their existence, can exercise sovereign national power in some of its forms only. Or, which is to state the same idea in different words, the sum of sovereign national power held by any one nation may be considered as consisting of various powers, all, or some only, of which may be exercised by any specified political bodies or persons ; and this international relation may exist between any such political bodies and any other such, in reference to the exercise of the powers so held by them ; provided the powers, so held, are held and exercised, as sovereign, or independently of all exterior authority.

§ 383. It being a basal principle of the public municipal law of the United States, which is proved by the written Constitution, as the evidence of a pre-existing fact, that the sum of sovereign national power is divided between the national Government and the several States, and that the powers held by the

<sup>1</sup> *Ante*, §§ 53, 54.

several States are sovereign in their nature and mode of exercise, by each within its own jurisdiction, they are to be considered as sovereign and independent nationalities having full right to establish laws for their own domain by the exercise of those powers.<sup>1</sup>

§ 384. This division and distribution of sovereign power in the United States and the distinction of municipal laws having a variety of territorial jurisdiction, necessitates a distinction of persons as native or alien subjects of these various jurisdictions.

The native inhabitant of any one of the States is also, of necessity, subject to the national powers vested in the Government of the United States. But though, in this sense, a native of the United States and subject as such to the authority of the national Government, he would, in every other State, be still an alien in respect to the powers exclusively vested in such other State and the local law proceeding from those powers.

Also, since the national authority, vested in the Government of the United States, extends everywhere throughout the dominion of the States, he who by birth is an alien to that national jurisdiction, would be also such in regard to any State in the Union.

<sup>1</sup> *Buckner v. Finley*, 2 Peters, 590. "For all national purposes embraced by the federal Constitution, the States, and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In other respects the States are necessarily foreign to and independent of each other. Their constitutions and forms of government being, though republican, altogether different, as are their laws and institutions." See also, *Warder v. Arrel*, 2 Wash. 298, (Court of Appeals of Virginia,) *Washington, J.*, in *Lonsdale v. Brown*, 4 Wash. C. C. p. 154, after speaking of the political nature of the union between England and Scotland says, "How different is the union of these States. They are, in their separate political capacities, sovereign and independent of each other, except so far as they have united for their common defence, and for national purposes. They have each a Constitution and form of government, with all the attributes of sovereignty. As to matters of national concern, they form one government, are subject to the same laws, and may be emphatically denominated one people. In all other respects, they are as distinct as different forms of government and different laws can render them. It is true that the citizens of each State are entitled to all the privileges and immunities of citizens in every other State; that the sovereignty of the States, in relation to fugitives from justice and from service, is limited; and that each State is bound to give full faith and credit to the public acts, records, and judicial proceedings of the sister States. But these privileges and disabilities are mere creatures of the Constitution, and it is quite fair to argue, that the framers of that instrument deemed it necessary to secure them by express provisions."

Descriptions like the above will have a variety of significance, according to the political theories of the reader and the speaker.

Under the municipal (national) law of the United States, there may therefore be aliens to the whole Union, who, in the view of designating them by brief terms of description, may be termed *foreign* aliens, and aliens to a State only, who may be termed *domestic* aliens—a distinction similar to that existing during the colonial period between aliens to the empire and aliens to a colony ;<sup>1</sup> and the several States of the Union may sustain, as distinct polities, an international relation to each other, and to other possessors of supreme national power ; and the maxims, or rules of action constituting international law, are applicable to the exercise of the sovereign powers held by them.

§ 385. The maxims of international law, public and private, applied to the relations of the several States toward each other, constitute, therefore, a part of the national municipal law of the United States. The propriety of considering any law as being international, and at the same time a part of the national municipal law, (law limited to the territorial extent of the United States,) arising from the fact, that the several States do possess independent and sovereign powers, and that the possession or distribution of those powers, is determined by the Constitution ; which is itself national municipal law.

§ 386. From the nature of the political bodies or persons upon which it operates, international law is *law* only in an imperfect sense, for such bodies or persons ; and, in its effect upon the rights and relations of private persons, that is, when it becomes *private* international law, it has the force and authority of law in the strict sense only by being enforced by the source of that municipal (internal) law, whose application to persons it is said to limit.<sup>2</sup>

In a state or nation wherein the sum of national state power, or the entire sovereignty, is concentrated in one political unity, and in which, of course, all municipal law proceeds from one and the same source, the modification of every part of that law in reference to aliens, (which modification is the private inter-

<sup>1</sup> *Ante*, § 281.

<sup>2</sup> *Ante*, §§ 11, 12, 59.

national law as received within that jurisdiction,)<sup>1</sup> depends upon one and the same possessor of sovereign power. If within a single state or nationality the sum of sovereign powers can be divided between different depositories, each of which is a source of municipal law, the question would arise,—by whom is the modification of those laws in respect to aliens, to be made?—or,—from whom does the international law, which regulates the application of those laws to aliens, proceed? Within the limits of any one of the United States, all persons are subject to a sovereignty divided between the national Government and the State; and each is a source of municipal law for that jurisdiction. The powers held by each of these being sovereign, the laws proceeding from each affect, according to their purpose, all persons found within their assigned territorial dominion; and the application of each of those divisions of municipal law to the rights and relations of aliens would be fixed, for each, by its own sovereign source. Or—to express the same somewhat differently,—the international rules modifying the application of either of these divisions of municipal law to the relations and rights of aliens, would be those allowed by the originating source of that division of municipal law. Those rights and obligations of persons which were under the control of one of those sources of law, in the case of native-born subjects, would, as rights and obligations of an alien subject, be determined by the same power, that is, the same source of law.

§ 387. But it is only foreign aliens, who, within any State of the Union, are aliens at the same time towards the jurisdiction and forum of each of these divisions of municipal law and their respective sources. Domestic aliens are such as are always at the same time native or domiciled subjects of the national law. In the case of the first, that is, the foreign alien, the application of both parts of the municipal law, the national and the local, is to be considered: in the case of the second, that is, the domestic alien, only the application of one of those divisions—the local. This modification of the municipal laws of

<sup>1</sup> *Ante*, p. 65.

the United States—in their application to aliens of either class—constitutes the private international law prevailing in and for the United States; being still law only in an imperfect sense, when distinguished, in respect to *its authority*, from the municipal law which it modifies; since the so-called international law, in applying or restricting the municipal or local laws of any jurisdiction, still derives its legal force from the source of the local law.<sup>1</sup>

§ 388. But although that application or restriction depends, for its ultimate authority, upon the source of the municipal law, it may also be made *judicially* by rules derived, as a law of natural reason, from the general practice of nations, or from the writings of jurists who have analyzed that practice and shown the mode of its application in supposed or actual cases; and as such may be distinguished, in any particular state, from the municipal law, in its origin and juridical basis, as well as in its operation upon a particular class of relations.<sup>2</sup>

It is, however, important here to recur to a distinction in the nature and authority of those rules of action, which together may be called private international law. All law applying to private relations and personal condition is in a great degree public as well as private law.<sup>3</sup> Of this international law, thus applied to private relations, a portion is preëminently public, in being connected with the very nature and mode of existence of all sovereign states, or of all possessors of sovereign power, as has been shown in the first chapter, where this portion has been described under the nature of “natural or necessary law of nations.”<sup>4</sup>

Since, therefore, the several States and the Government of the United States are the possessors of sovereign powers within their determined geographical limits, this portion of international law enters of necessity into the political Constitution of the United States, and forms a part of the national municipal law, and is constantly operative.

These principles or maxims, whether applied as municipal

<sup>1</sup> *Ante*, §§ 68, 69, 74, 75.

<sup>2</sup> *Ante*, § 25.

<sup>3</sup> *Ante*, § 76.

<sup>4</sup> *Ante*, § 49.



or as international law, are necessarily the same, or have the same legal force within the jurisdiction of every possessor of sovereign power. But the actual application or modification of the municipal laws of any one jurisdiction, when applied to the relations of aliens, is itself private international law, (from the character of the persons to whom it applies, which character is fixed by the maxims last above spoken of,) in the jurisdiction in which it takes place. And since that application or modification depends, within any independent jurisdiction, upon the will of the sovereign source of the municipal law for that jurisdiction, and may be different in jurisdictions under separate sovereigns, therefore this portion of international law may be said to vary under different sources of municipal law. And, in being identified in *authority* with the municipal law, it may truly be considered as a part of that law ; though it arises from the fact that there are separate possessors of sovereign power existing under necessary conditions, and that there are actions and relations of persons which cannot continuously exist under the exclusive control of any one possessor of that power, and which therefore have an international character.<sup>1</sup> Now since the several States have separate jurisdictions or domain, in which they have sovereign powers to determine the relations of private persons therein, they may have a different practice in the application of their municipal laws to aliens. Or, it may be said, their municipal laws may differ in their recognition of the relations of aliens derived from other laws. Hence a portion of the private international law may not only be different in the different States, but must be classed with local and not with national law.

§ 389. The Constitution of the United States, in being the supreme public law and the evidence both of the location of sovereign powers and of their extent and limitation in respect to private persons as well as to territory, takes effect on the persons, above described as aliens, by determining the sources (political persons) from whom the private international law, above defined, shall proceed.

<sup>1</sup> *Ante*, § 10.

The Constitution might contain provisions directly establishing the absolute or the relative rights of aliens of either of the classes before described, i. e., either *foreign* aliens or *domestic* aliens, and limiting to that extent the powers of the national Government or those of the several States to affect the legal condition of such persons. Such provisions in their source and origin would be identified with the national municipal law ; though being founded on a recognition of persons as aliens, they might be called a part of the private international law. In whatever degree such provisions might recognize private persons as foreign citizens or subjects—that is, persons within the dominion of the United States, not only alien to the United States, but sustaining relations to foreign states or nations—they would be nothing more, as a *law*, (rule of action), for the *nation*, than the voluntary reception of a rule of international duty by the supreme power of the nation, and alterable at its will.

So far as such provisions might limit the application of State laws to persons who are aliens, either foreign or domestic, in respect to State jurisdictions, they would have an international effect or character by distinguishing those persons from native or domiciled subjects of those States. But, being law throughout the United States, independently of the will of the single States, as distinct political communities, the extent or personal jurisdiction of whose laws they would control, they would be *law* in the strict and proper sense, national municipal law—operating on all persons within the United States, irrespectively of the will of the several sources of local municipal law, and therefore not international law between the States or for the States, in that imperfect sense of the term in which international law prevails among independent nationalities.<sup>1</sup>

§ 390. Among the necessary incidents of the existence of sovereign nations or states is the fact or axiom, (natural or necessary law of nations,) that aliens, under any system of municipal law, may acquire within its jurisdiction, the character of

<sup>1</sup> *Ante*, §§ 10, 11, 12.

native born inhabitants, by voluntarily abandoning those relations which they held under international law, and, with the consent of the sovereign power legislating within that national jurisdiction, passing under the exclusive control of its municipal (internal) law.

This incident of the extent or operation of municipal (national) law may be considered with reference either to foreign or to domestic aliens.

§ 391. Since within any State of the United States the municipal (internal) law proceeds from two sources, the foreign alien might acquire the relations of a native born citizen under each source of that law. But in that case, the changes of the character of an alien for that of a native inhabitant, in regard to each source of that law, would not necessarily be simultaneous or have any necessary connection. There is nothing in the nature of the division of sovereign powers between the several States and the national Government, nor in the fact that the powers held by each must be taken together in order to form the sum of sovereign national power, to prevent the States from granting, each within its own territory, to an alien resident any civil (social) or political rights within the scope of the relations determined by their separate share of sovereignty. Nor is there any thing to prevent the Government of the United States from granting, within the several States, to foreign aliens, the civil or political privileges of a native of the United States in relations established under the supreme powers held by itself. But, from the sovereign and separate nature of the powers held by each, neither, without special provisions in the Constitution to that effect, could alter the personal relations of aliens towards the powers held by the other; even while having territorial jurisdiction over them, nor give to them, in all respects, the character of its own native born subjects; who, by birth, are equally native to the jurisdiction of a State and to that of the United States. And, regarding *liberty* as consisting in the possession of rights under some possessor of sovereign power—neither could confer upon such alien *liberty* in legal relations determined by the powers belonging to the other.

Still less could a State, without agreement, give to a foreign alien the rights of a native born inhabitant before the local municipal law proceeding from the separate share of power belonging to another State.

§ 392. Although, upon his removal into another State of the Union, the relations of the native inhabitant of any one State would remain unchanged, under the national municipal law, he would still, as before said, be an alien in such latter State to the local law. A State might receive such persons—domestic aliens—into the condition of its natural born subjects. But this would depend upon its own will and election—its own view of the force of international law, as law in the imperfect sense,—unless the Constitution of the United States should contain provisions regulating such change of alienage in the case of those persons, and have, in this respect, international or *quasi*-international *effect* between the several States, with the *authority* and *extent* of national municipal law.

§ 393. When the relations or rights and obligations of aliens to the United States (foreign aliens) are to be determined, as a topic of international law, it is first to be inquired,—whether any and what rights or relations are determined for them by the Constitution, as a law affecting the rights of private persons, or as private law ?

Next : What are the relations and rights of persons falling within the sphere of the national Government, and what relations are subject to the remainder of power vested in the several States ?

And lastly : What is the actual application by the State, or by the national Government, on either hand, of its municipal (internal) laws to aliens ; or, in other words, what is its acceptance of the private international law applying to such aliens.

§ 394. When the relations or rights and obligations of domestic aliens are to be determined, it must first be inquired how far they are fixed by that national municipal law which applies to such persons simply as native or domiciled inhabitants within the jurisdiction of the national power ; so that, whether the person be domiciled or alien in respect to such State, they

continue the same in every State ; and whether that national law restrains the personal application to them as aliens of the local laws of the State in which they appear as aliens, i. e., whether it has a *quasi*-international effect in determining those rights ; the national municipal law being herein regarded both as a territorial and municipal (internal) law, and also as a personal and international law.

According to what has been before said, this law is to be found in the Constitution *operating as private law*, and in the legislation of Congress, under the constitutional grant of power to legislate for the entire domain of the United States.

§ 395. This, as a law affecting relations of private persons, is always *private law*. But it may also have, more or less decidedly, in many respects (in reference to many relations), the marks of *public law*, law operating on public or political persons, in controlling or limiting the action of the local juridical power of the State in reference to such alien persons ; either by acting immediately on those persons, and directly determining their relations to other persons, (in which case it is private law,) or by first acting on the State as a political person, and determining its action in reference to such aliens ; in which latter case the national law having international effect is rather public law causing the States to act on private persons : and the States, in their political capacity, are then to be regarded as the real subjects of the rule. Whether there can be in the Constitution any law, in the strict and proper sense, having such effect or operation, may well be doubted. But it will be shown that the existence of such a law in certain provisions of the Constitution has in some decisions been assumed, as a ground of a legislative power in Congress in reference to those provisions.

§ 396. If there are relations or rights and obligations of domestic aliens which are left undetermined by the national municipal law, having this *quasi*-international effect, it is then to be inquired—what has been the actual application of the local municipal law of the various States, to such persons, by the States, individually or severally ? Or,—in another form of expression, according to the definition of international law before

given—what is the private international law in the several States applying to such persons :—that law which is denominated *international* from the character of the persons to whom it applies ; but which is *law*, in the strict sense, only because identified in authority with the local municipal law of each State.

§ 397. Since the Territories, the District of Columbia, &c., have not the political nature of a State of the Union, not being inhabited by a people historically known as the people of a State of the United States, the totality of supreme power over those Territories, &c., and the inhabitants, or the sum of all the powers of a national sovereignty, (which of necessity, by the natural or necessary law of nations, must be held by or invested in some political person or persons,) can be vested solely in the nation,—the people of the United States,—the only other possessor of sovereign power recognized by the Constitution—the evidence of the possession of sovereign power.<sup>1</sup> Therefore the exercise of any of the powers of a national sovereignty over those Territories, &c., is to be determined solely by the Constitution, operating as a public rule of action, which can be the only warrant for the exercise of any of the authority possessed by the United States as one nation.<sup>2</sup>

If that residue of sovereign powers which, within the limits of the several States, is held by the people of each is, within the Territories, &c., of the United States, held (by delegation, for the United States, or the people of the United States) by the national Government or by Congress, then those Territories, &c., may be considered as being in the relative condition of a *State* of the Union in reference to laws proceeding from the (residuary<sup>3</sup>) class of powers, so held by the national Government or by Congress. These several jurisdictions, though not governed un-

<sup>1</sup> *Ante*, § 346.

<sup>2</sup> *Ante*, § 376.

<sup>3</sup> That is, powers of the same kind as that class of powers which, in and for the *States*, are held by the people of the State severally, and called “residuary” or “reserved” powers, in distinction from those “granted” by the people of the United States to the National Government. *Johnson, J., in Am. and Ocean Ins. Co. v. Canter*, 1 Peters', 546 ; “In legislating for them, [the territories,] Congress exercises the combined powers of the general and of a State Government.”

der the political organization known in the public municipal law of the United States as a State of the United States, may have, or be under, a local municipal law, while they are at the same time, also, like a State of the United States, under the national municipal law which, as private law, has equal extent throughout the whole dominion of the United States. And that local municipal law will be, like the local law of the organized States, divisible, according to the domicile or alienage of the persons to whom it may be applicable, into municipal (internal) and international law.

Whether those provisions of the national municipal law which have the effect or character of international or quasi-international law (public and private) will also have the same effect in respect to the Territories, &c., which they have in respect to the organized States, will depend upon the proper construction of those provisions, and the proper interpretation of the terms in which that law may be expressed in the Constitution.

§ 398. The distinction of the laws of the United States into laws which are either national or local in their extent, which distinction is founded upon the political character and territorial jurisdiction of the sovereign power from which they proceed is, as has been shown,<sup>1</sup> the most obvious basis for an analytical distribution of the various laws which may affect the condition of private persons. Each of these two parts would then again be divisible, in respect to the character of the persons on whom it might operate, into *municipal* (internal) and *international* law. The two branches of *international* law which would thus be made, might each again be divided with reference to the specific character (in respect to domicile) of the alien persons to whom it applied, into that law which determines the relations of "domestic" aliens and that which determines the relations of "foreign" aliens, as those classes of persons have herein before been distinguished.<sup>2</sup> But—from the mode in which a part of the private international law of any country is *judicially* ascer-

<sup>1</sup> *Ante*, § 377.

<sup>2</sup> *Ante*, § 384.



tained, viz., by distinguishing certain principles of the municipal (internal) law as having or as not having universal personal extent or application, and from the fact that those rules which determine the international relations of the States, or their inhabitants, towards each other have also (in being the law of one country or nation) the character of municipal (internal) law—it will be more in accordance with the natural and historical development of the laws of the United States, not first thus to distinguish them, according to their political character or authority, into national and local; but, according to their kind, quality, or effect, and the character of the persons to whom they apply, into *municipal* (internal) and *international* law; and afterwards to subdivide each of these with reference to its various sources and territorial jurisdiction.

§ 399. With reference to the foregoing considerations of the operation of the public law of the United States, both in determining the sources of legislation and in having itself effect upon the relations of private persons, the private law of the United States may be classed according to its extent or jurisdiction over territory and persons as either *municipal* (internal) or *international* law.

§ 400. The *private municipal* (internal) law, may be divided, in respect to its source and extent over territory, into

1. *National municipal* (internal) law,—contained in the Constitution or proceeding from the general legislative powers of Congress, having national operation and effect throughout the dominion of the United States, whether States or Territories, &c.

2. *Local municipal* (internal) laws,—proceeding from the powers reserved to the States, or from the legislation of Congress over the Territories, &c., and having operation or effect therein only.

§ 401. The *private international* law of the United States may be divided according to the persons upon whom it operates, or in reference to whom it exists—as either:

1. *International law applied to domestic aliens*—those who, within the jurisdiction of a State, are alien to it, but not to the jurisdiction of the national Government: which part may, in

distinction from the other, be denominated the *domestic international* law of the United States.

2. *International law applied to foreign aliens*—those who are at the same time aliens to the jurisdiction of the national Government, and to that of any State in which they may enter.

§ 402. The first of the above named divisions of international law—*domestic international law*—may again be divided in reference to its source and authority into :

1. That law which, though *international*, by the character of the persons to whom it applies, is identified in its source and authority with the *national municipal* (internal) law, and which therefore, if acting on private persons, is law in the strict sense, independently of the will of the several States in which it operates ; which division, in distinction from the second, may be properly denominated *quasi-international* law. This law is found either :

- a. In the Constitution itself operating as private law ; or,
- b. In the legislation of Congress under the Constitution.

2. That which, though international by the character of the persons to whom it applies, is identified in its authority with some local municipal (State) law ; and which, if distinguished from the last in its origin, source, or authority, is not law in the strict sense of the word.

§ 403. The second of the above principal divisions of the international law, viz., that applying to foreign aliens, may also be subdivided into two parts, according to the jurisdiction of that municipal law in reference to which the person is considered an alien.

1. That law which determines the relations of foreign aliens in reference to the national municipal law. This, though *international* from the character of the persons to whom it applies, will be a *law* in the imperfect sense only for the power from which the national municipal law proceeds, and in legal *authority* is identified with that law.

2. That law which determines the relations of foreign aliens in reference to the local municipal laws of the several States.

This again may be distinguished either as :

*a.* Law resting on the source of the national municipal law, and therefore identified in *authority* with the first of these subdivisions.

*b.* Law resting on the source of that local municipal law in reference to which the relations of the foreign aliens are considered, and therefore identified with it in its *authority*, as law in the strict sense.

§ 404. Wherever sovereign national power is divided between different depositories, freedom or its opposites may be considered in reference to the action of each possessor of any portion of that power: because every exercise of power limits or extends freedom of action in some relation. When freedom and its opposites are considered as legal conditions, consisting in different degrees of liberty of action in various relations created by law, the whole of jurisprudence is nothing else than the definition of those conditions.

The further consideration of freedom and its opposites in the United States is to be made by tracing the effects of the laws, included under the division above made, in creating or sustaining rights and obligations incident to the condition or status of private persons.

## CHAPTER XIV.

### THE NATIONAL MUNICIPAL (INTERNAL) LAW OF THE UNITED STATES—ITS EFFECT UPON CONDITIONS OF FREEDOM AND ITS OPPOSITES.

§ 405. Since the *freedom* herein to be considered is only such legal freedom from the control of others and general liberty of social action as includes the possession of *individual* rights and legal capacity for the ordinary *relative* rights attributed to persons in a civil state, and *bondage*, or *servitude* is viewed as a condition consisting in a greater or less diminution of such possession or capacity, (whether including the idea of *chattel condition* or not,) the several divisions of the private law of the United States, given in the preceding chapter, will hereinafter be regarded in respect to its effect on the possession or enjoyment of these rights, or as forming a law of *status* or *personal condition*.

The first division of private municipal law in the preceding chapter, was that called *national municipal law* ; which was defined to be that contained in the Constitution, or proceeding from the legislative power of the national Government, and having general extent and effect upon persons and things throughout the dominion of the United States, whether States or Territories.

§ 406. In the introductory analysis of the topics of the law, or of jurisprudence, it was shown that the first distinction known to the law is that between persons and things ; and that, under any system of law wherein that distinction is attached to natural persons, the attribution of the legal character

of a *thing*, or of an *object* of rights exclusively, is a denial, in the most absolute form, of liberty of action under law. This distinction being analytically, or logically, anterior to a description of the rights of *persons*, like that under Blackstone's analysis, and necessarily considered as a mark of *status* or *condition* in the civil law sense ; which comprises those legal principles which attribute or deny personality and a capacity for legal rights to human beings.<sup>1</sup>

All law is, in a certain sense, a limitation of freedom ;<sup>2</sup> and the national municipal law, herein before defined, by creating rights and obligations in various relations, throughout its jurisdiction, defines or limits freedom in each local State jurisdiction, as does also the local municipal law of the State. But the establishment of such a distinction between natural persons as gives to one the legal character of an object, only, of the rights of another, or even gives to one such a right of personal control over another, as constitutes the relation of master and servant, without the consent of the latter—even when his legal personality is recognized, is the result of a single and distinct exercise of sovereign legislative power ; and therefore in a state, wherein it is distributed between several distinct depositories, can be vested in one only of the possessors of that kind of power.

§ 407. The Constitution does not contain any definition or limitation, of the sovereign powers belonging to a political state or national sovereignty. Therefore, according to the distribution of sovereign powers contained in or evidenced by the Constitution which has been stated in the previous chapter, it may be inferred, that the power to establish this distinction is either granted by the Constitution to the national Government, or, if not prohibited to the States, remains with them, as one of the

<sup>1</sup> *Ante*, § 44.

<sup>2</sup> And, in a certain sense, it is true that liberty is a thing impossible ; as said by some ; Nodier's *Jean Sbogar*, (a novel said to have interested Napoleon,) ch. 18. Ruskin's *Seven Lamps* : the Lamp of Obedience. Amer. ed., p. 165. The idea is not very new. Eurip. *Hec.* l. 864.—

Ὅυς ἔστι θνητῶν ὅστις ἐστ' ἐλεύθερος . . .  
Ἡ πλῆθος αὐτὸν πολέος ἢ νομῶν γραφαί  
Εἰργουσι χρῆσθαι μὴ κατὰ γνῶμην τρόποις.

reserved powers, spoken of in the tenth Article of the Amendments.

But the extent to which sovereign national power may rightfully proceed in affecting the condition of individual members of society being taken to depend upon the will or judgment of the state, or of the actual possessors of its powers, as constituting the only *legal* test of the just and natural powers of the state, it may first of all be questioned whether the people of the United States, as the possessors of that sovereign power, have, either as one national sovereignty, or as different communities uniting in the exercise of separate powers, so limited that power in their own hands, that the establishment of this distinction in the legal condition of natural persons can no longer be *legally* considered within the limits of the highest power known (under law) in the United States; and consequently may not be juridically said not to exist, either in the powers of the Government of the United States, or among those of the several States. In other words, the inquiry may be made whether any recognition has been made by the actual and ultimate sovereign from whom the Constitution, regarded as public and private law, proceeds, of the innate and necessary personality of all men; such as necessarily attributes to all a legal capacity for rights, opposed to the condition of a thing, and implies the possession of individual rights by all natural persons, especially of the right of personal liberty. In like manner as it may be considered acknowledged by all Christian sovereignties, that each individual human being has a right to life, independently of the will of the supreme power of the state, which right is not to be infringed except on forfeiture for crime. Such an acknowledgment may not be found embodied in specific declarations, but may justly be inferred from the public action of Christian states, if not of all nations, to be received by them as a natural principle. A similar acknowledgment might exist in regard to personal liberty, or all individual rights. Such declaration could not indeed coerce with any legal force the supreme national power; or, in the United States, the ultimately sovereign people. The solemn recognition by

that sovereign, of rights in individuals, would however be a moral security against the action even of that sovereign power itself ; being public expressions of great principles of political ethics, and in the nature of a recognition of natural law, or of an assertion of natural reason by the highest earthly authority, which would prove, to all subject to that power, the deepest attainable basis for liberty by or with *law*.<sup>1</sup>

§ 408. The written Constitution of the Government of the United States being the highest law known therein, by being the controlling expression of sovereign will, wherever its provisions can apply, it must here be looked to as the determining criterion of what may be a principle of public or private law. There might be, in the Constitution, declarations which would have various effects as law upon the rights of persons, determining either the nature and number of those rights, (as topics of private law,) or their extent in reference to the different depositaries of power, (as topics of public law.) Provisions might exist therein, applying to all or to some natural persons within the dominion of the United States, such as would necessarily imply a legal personality, and capacity for rights in legal relations ; or they might be such as would establish the possession of specific rights by all, or by some, equivalent to establishing a condition of freedom, in a greater or less measure, for all included under those provisions.

Provisions having such effect, as private law, would be also public law, in respect to either or both of the two depositaries of sovereign power recognized by the Constitution ; and would

<sup>1</sup> Comp. Burke in debate on India Bill, Parl. Hist., vol. xxxiii, 315 ; Smith's Comm., p. 257. M. B. de Constant, Œuvres, tom. i, p. 189 : " Sans vouloir, comme l'ont fait trop souvent les philosophes, exagérer l'influence de la vérité, l'on peut affirmer que, lorsque de certains principes sont complètement et clairement démontrés, ils se servent en quelque sorte de garantie à eux-mêmes. Ils se forment à l'égard de l'évidence une opinion universelle qui bientôt est victorieuse. S'il est reconnu que la souveraineté n'est pas sans bornes, c'est-à-dire, qu'il n'existe sur la terre aucune puissance illimitée, nul, dans aucun temps, n'osera réclamer une semblable puissance. L'expérience même le prouve déjà. L'on n'attribue plus, par exemple, à la société entière, le droit de vie et de mort sans jugement. Aussi nul gouvernement moderne ne prétend exercer un pareil droit. Si les tyrans des anciennes républiques nous paraissent bien plus effrénés que les gouvernans de l'histoire moderne, c'est en partie à cette cause qu'il faut l'attribuer. Les attentats les plus monstrueux du despotisme d'un seul furent souvent dus à la doctrine de la puissance sans bornes de tous."



control the exercise of one, or the other, or both of the two classes of powers separately invested in them, viz. : those invested in the national Government, for national extent, and those remaining in the States, to take effect within their local jurisdictions ; or those invested in the national Government, to act locally in specified territories.

§ 409. In all states wherein the mechanical Government is distinct, in the mode of its existence, from the ultimate national sovereign, and acts only in forms prescribed by public law, the constitution of the Government is, in itself, to a greater or less degree, a guarantee of just laws for the people governed ; since the ordinary instrument of authority is liable to control by the ultimate sovereign, in case of an abuse of the power intrusted to it ; even when it is not specified, by public law establishing that form of Government, wherein such abuse shall consist ; or, in other words, when the power intrusted to the Government to affect the rights of private persons is not specifically limited.<sup>1</sup> When, by the constitution of the Government, its powers are limited, or, which has the same effect as public law, when rights of action are attributed to the persons governed, as independent of the action of the Government, the Constitution has direct effect as private law ; and the rights of private persons guaranteed by it, whether political or civil, have the distinct character of legal liberties, in being ascertained and defined by law proceeding from the highest legislative authority.

In making a grant of powers to the national Government, the Constitution defines those powers in specific terms, and also limits their extent, by the recognition of certain rights in the people, as individuals, who are to be subject to those powers ; which provisions are in that respect private law, a law of private rights as well as public law, because allowing to all persons, included in the scope of those provisions, liberty, in certain relations, independently of the action of that Government.

§ 410. Of this character are the first nine Articles of the

<sup>1</sup> But this can only be when precedent and the possession of rights under personal laws have acquired a constitutional (*institutional*). See Lieber, Civ. Lib. and Self Gov.) existence in the national sentiment.

Amendments, the second and third paragraphs of the ninth section of the first Article, the third paragraph of the second section and the whole of the third section of the third Article. These provisions limit the powers of the Government of the United States both in their national and in their local extent, i. e., whether operating generally in all the States, or in limited territorial jurisdictions,<sup>1</sup> and are, in reference to that Government, of the

<sup>1</sup> Dred Scott's case, 19 Howard, (Opinion of the Court,) p. 447, "the personal rights and rights of property of individual citizens as secured by the Constitution. All we mean to say on this point is, that as there is no express regulation in the Constitution defining the power which the General Government may exercise over the person or property of a citizen in a territory thus acquired, the court must necessarily look to the provisions and principles of the Constitution, and its distribution of powers, for the rules and principles by which its decision must be governed." And again, on p. 449, (it being observed that though the reference is to the powers of the national Government in the Territories, it is assumed that the principle applies throughout the entire national domain, whether States or Territories.) "But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government. The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a Government and sovereignty. It has no power of any kind beyond it; and it cannot, when it enters a Territory of the United States, put off its character, and assume discretionary or despotic powers which the Constitution has denied to it. It cannot create for itself a new character separated from the citizens of the United States, and the duties it owes them under the provisions of the Constitution. The Territory being a part of the United States, the Government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out; and the Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved.

"A reference to a few of the provisions of the Constitution will illustrate this proposition.

"For example, no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances. [1st Art. Amend.]

"Nor can Congress deny to the people the right to keep and bear arms, [2d Art. Amend.] nor the right to trial by jury, [5th and 6th Art. Amend.] nor compel any one to be a witness against himself in a criminal proceeding. [5th Art. Amend.]

"These powers, and others, in relation to rights of person, which it is not necessary here to enumerate, are, in express and positive terms, denied to the General Government; and the rights of private property have been guarded with equal care. Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. [5th Art. Amend.] And an act of Congress which deprives a citizen of the United States, of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

"So, too, it will hardly be contended that Congress could by law quarter a soldier in a

nature of Bills of Rights, as they have been long known to the British islands and the American colonies ; or rather, analogous to such bills, since they have a higher character in reference to the powers of the Government than any Bill of Rights compared with the power of the English parliament ; for, by the theory of the English law, parliament is supposed to be omnipotent in legislation ; whereas, in American public law, these guarantees of liberty have an equal character, as *law*, with the constitution of the Government, and are susceptible of change only by the same power which created it, giving to the liberties so reserved the character of liberty by *law*, in the strictest sense of the term.

§ 411. Of like character are those limitations on the power of the several States, in the tenth section of the first Article, prohibiting them from passing any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts ; and those in the fourth Article, limiting their powers in certain *quasi*-international relations which are hereinafter to be specially considered.

§ 412. The whole Constitution, whether public or private law, partakes, in fact, of the nature of a Bill of Rights, against the depositaries of power ; being intended, by the express de-

house in a Territory without the consent of the owner, in time of peace ; nor in time of war, but in a manner prescribed by law. [3d Art. Amend.] Nor could they by law forfeit the property of a citizen in a Territory, who was convicted of treason, for a longer period than the life of the person convicted ; [Const. Art. I, sec. 1, 3d para. Art. III, sec. 3,] nor take private property for public use without just compensation. [5th Art. Amend.]

“ The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under Territorial Government, as well as that covered by States. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a Territory, so far as these rights are concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the General Government might attempt, under the plea of implied or incidental powers.”

<sup>1</sup> Hoke v. Henderson, 2 Dev. N. C. Rep. 15 ; per Ruffin, C. J., “ The law of the land in bills of right does not mean merely an act of the legislature ; for that construction would abrogate all restrictions on legislative authority. The clause means, that statutes which could deprive a citizen of the rights of person or property without a regular trial according to the course and usage of common law, would not be the law of the land, in the sense of the Constitution.”

Also, Virginia Assembly Report, of 1799 ; Randolph's Ed. p. 220 ; Lessee of Livingston v. Moore, 7 Peters' R. and Appendix I ; Jones v. Perry, 10 Yerger's R. 59 ; 4 Hill, 146.

laration of the constituting power in the preamble, to be the means of "securing liberty and establishing justice to the people of the United States and their posterity." The grant of powers by specification to Congress, the executive and the judiciary department; the separation of the functions of supreme power; the reservation of power to the people in the political condition of distinct States are, as well as the provisions above alluded to, in their tendency, securities of liberty to the people in various private relations, as the subjects of supreme power, while at the same time bulwarks of power to the same people, politically united or separated, as the ultimate and only sovereign.

§ 413. It is evident that the attribution of these rights to the people of the United States, against the specified powers of the national Government, is equivalent to a recognition of personality and capacity for legal rights in all the inhabitants of the dominion of the United States, whether States or Territories, if, by the word *people*, every inhabitant of that dominion is intended. These rights are legally predicable only of legal persons, and, therefore, when so predicated, are equivalent to an attribution of a free condition, opposed to a status of chattel slavery. The application of such provisions, as a personal law, to any natural persons is manifestly incompatible with the legal negation of personality, or the attribution of that legal status which consists in the non-recognition of rights before the supreme power of the state.

In like manner as the Constitution, considered as public law and the evidence of the possession of sovereignty, is to be construed or interpreted by previous laws and customs, in order to distinguish the persons who are therein referred to as the constituting people of the United States,<sup>1</sup> so, in the application of these provisions and the interpretation of this preamble as private law, the same reference must be had to previous law and juridical usage, to determine who are the natural persons to whom personality and a capacity for these specified rights is to be attributed by the force of these terms, as well as the extent

<sup>1</sup> *Ante*, § 350.

and meaning of the terms in which those rights are conveyed or recognized.

§ 414. In *public* law the people spoken of in the instrument must be taken, as before shown, to be a certain political people or mass of individuals politically organized into existing States, or peoples of States, determined by facts antecedent to the Constitution, and so distinguishable from the mass of the inhabitants. And, since the hereditary possession of civil and social liberty under ancient *personal* laws was an essential circumstance in determining who constituted that people, or the people of those States, liberty, here spoken of, whether political or civil, must, in connection with private rights, or as it forms the right of a private person, be taken to be something dependent on laws and customs, or something personal to certain individuals determined by laws of descent and inheritance, and not predicated of all mankind as innate, or determined only by the fact of possessing the human nature or form.<sup>1</sup> It must be taken to be political, civil, or social liberties, identified with some known *legal rights*, already determined by the municipal and international law, or by common law, the *law of nations*, and colonial or imperial statute law ; and to be liberty consisting in relations existing *under law*, not a condition *antecedent* to law. The clauses of the Constitution in which persons are spoken of as either free or not free, and as held to service or labor, are another evidence that the liberty spoken of is that determined by previous law and usage. And since legal liberty relates to freedom of action as a *right*, which can legally be predicated of *persons* only, if the liberty spoken of is dependent on previous laws,

<sup>1</sup> "Es erben sich Gesetz und Rechte."

However false may be the doctrine of Mephistophiles, in his lecture to the disparagement of jurisprudence, it is not less true in America than in other countries:—

"Nay, there, I think your judgment not amiss,  
I know, full well, what that Profession is.  
Talk of your *law* and *right*! Descend not these  
Like an inveterate family disease?  
They glide along from race to race,  
And softly steal from place to place;  
Sense is made nonsense, goodness held in scorn,  
Woe unto thee, that thou a grandson art;  
Alas! the rights that with us all are born  
Here of the question never form a part."

Goethe's *Faust*: Talbot's Tr.

it can only belong to those who were legally, or by those laws, *persons*.

§ 415. As was before shown, when territories inhabited by a people living in that social form which is known as a state among civilized nations pass under the dominion of new political sovereigns, the laws which thereafter are in force in those territories are still, both in their territorial and personal extent, those which previously existed therein, and which are not inconsistent with the supremacy of the new power.<sup>1</sup> Still more evidently is this the case when such change of sovereignty is only domestic or civil, and when the new depositaries of power rest their claims on the maintenance of previously existing laws. Unless therefore there was something in the assumption of the totality of sovereign power by the people of the colonies, and in the establishment of the present public law of the United States, by which the foundations of civil society were broken up, and all rights reinvested on principles of some so-called natural law, as interpreted by the actors in the transaction, different from the law of natural reason juridically declared and contained in the previous law, there was nothing in those political changes to alter the condition or *status* of the inhabitants by the then existing private law ; or to affect rights of persons, so far as private and not political or public ; and the private law of the Anglo-American colonies must be taken to have continued to be the law of the new States, until changed by new legislative action, according to the location of supreme authority by the public law, and the subordinate judicial application of natural reason.

§ 416. The sovereignty of any state being, of necessity, the first principle of its own law, all propositions necessary, as assertions of fact, to support that sovereignty, or which have been publicly and authoritatively assumed to support it, may be taken to be recognized by that law. The act of the Continental Congress of July 4, 1776, declares the independence or sovereignty of the States, or of the nation ; but the propositions advanced

<sup>1</sup> *Ante*, § 123.

to justify the act, in the statement of the reasons or causes inducing it, can have legal force only on the ground of their necessary connection with it.

The preamble of the act of declaration announces its object to be to set forth the reasons which justify the colonies in severing the political bonds which had connected them with Great Britain and in assuming "an equal and separate station among the powers of the earth." It also contains certain general propositions, declaratory of rights, not only of communities, but also of private individuals. "We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of those ends, it is the right of the people to alter or abolish it, and to institute a new government, laying its foundations on such principles, and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness."

Although from the form of statement these propositions are made a part of the foundation for a declaration of political independence by the representatives of pre-existing political bodies, i. e., the States or colonies, it is plain, both from the rest of the document and from history, that, if the claims of those colonies rested ultimately on the rights of private persons inhabiting their jurisdictions, it was on those rights as they existed by and in the public and political law, and as they were vested in those persons by the constitution of the empire, as hereditary and attaching to them in the character of members of existing political and civil bodies, and not in individual or relative rights attributed by private law in social relations; and that if rights in that sense were also implied in the argument, it was not necessary to refer to any law of nature, as determining private relations, to support the measures of the revolution.

This further appears from the instrument itself, in the enumeration of the acts on the part of the



therein complained of ; which were alleged to be violations of previously existing laws, public or private, and of constitutional principles. If it was intended to argue that the natural liberty of all men, individually and apart from all human laws, gave them the right to resist the imperial authority, it is evident that the resistance might have been made at any previous time at which the inhabitants of the colonies had thought proper to separate ; which was never pretended. If the meaning is that the violation of *natural* liberty or of inalienable rights occurred by the violation of the *civil* and *political liberties* of the colonists, it is nothing more than the assertion that those civil and political liberties, as held by them under the public and private law, were such as the law of nature justified, without asserting that that law demanded their extension beyond the limits assigned by existing municipal law and political constitution.<sup>1</sup>

§ 417. Whatever may be the true theory of the seat of sovereignty, *jus summi imperii*, at the separation of the colonies from Great Britain, there, indisputably, was no grant of power to this Continental Congress to affect the *status* of persons, or to alter the basis of private law affecting the rights and relations of private persons as such.\* The instructions given to the dele-

<sup>1</sup> See 1 Lieber's *Civ. Lib. and Self Gov.*, 278 ; Bentham, *Principles of Morals and Legislation*, c. XVII., § 27, note, after referring to these expressions in the declaration — "Who can help lamenting that so rational a cause should be rested upon reasons so much fitter to beget objections than to remove them ? But with men who are unanimous and hearty about measures, nothing so weak but may pass in the character of a reason ; nor is this the first instance in the world where the conclusion has supported the premises, instead of the premises the conclusion."

\* 3 Dallas' Rep. 199, (1796), by Mr. Justice Chase : "It has been inquired what powers Congress possessed from the first meeting in September, 1774, until the ratification of the Articles of Confederation, the first of March, 1781. . . . I have retained all internal sovereignty, and its of external sovereignty."

form, the statement of facts,—modes of action, and to it may be applied the definition, *Propriété*, Tom. II., c. 48 : "Definición when they contain a command, acts which individuals are bound to obey, no other object than to make dangerous, and should be left to more authority than a simple will." Reddie's *Inquiries*,

gates to the Congress by the several colonial conventions and assemblies, prior to the Declaration of Independence, contained an express reservation to each colony of the sole and exclusive regulation of its own internal government, police and concerns : and whatever may have been the actual limits of that local sovereignty which was thus asserted, this reservation proves that Congress—the existing organ of the national authority—had not these powers. Nor was there any actual exercise of authority, as national or federal, by that Congress, during its existence, intended directly to affect the *status* of persons within the limits of State jurisdictions, except in freeing indentured servants and slaves who had served in the army ; and that only by making compensation to their masters.

Whatever declarations of the nature of supreme power, or of the individual or relative rights of the inhabitants, may have proceeded from that Congress, they can be taken to have legal authority only when necessarily assumed as principles justifying the exercise of the powers actually vested in them, and by which they had a very limited power of legislation.<sup>1</sup>

If these propositions in the declaration are to be taken in the sense of assertions of the right of all mankind to personal

<sup>1</sup> The opposite conclusion is expressed by Mr. Sumner in his speech in the U. S. Senate, Aug. 26, 1852. "*Thirdly.* According to a familiar rule of interpretation, all laws concerning the same matter, *in pari materia*, are to be construed together. By the same reason, *the grand political acts of the nation are to be construed together*, giving and receiving light from each other. Earlier than the Constitution was the Declaration of Independence, embodying, in immortal words, those primal truths to which our country pledged itself with its baptismal vows as a nation. 'We hold these truths to be self-evident,' says the nation, 'that all men are created equal, that they are endowed by their Creator with certain unalienable rights ; that among them are life, liberty, and the pursuit of happiness ; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.' But this does not stand alone. 'There is another national act of similar import. On the successful close of the revolution, the Continental Congress, in an address to the people, repeated the same lofty truth. 'Let it be remembered,' said the nation again, 'that it has ever been the pride and the boast of America, *that the rights for which she has contended were the rights of human nature.* By the blessing of the Author of *these rights*, they have prevailed over all opposition, and FORM THE BASIS of thirteen independent states.' Such were the acts of the nation in its united capacity. Whatever may be the privileges of States in their individual capacities, within their several local jurisdictions, no power can be attributed to the nation, in the absence of positive, unequivocal grant, inconsistent with these two national declarations. Here, sir, is the national heart, the national soul, the national will, the national voice, which must inspire our interpretation of the Constitution, and enter into and diffuse itself through all the national legislation. Thus again is freedom national."

liberty or to a legal condition of freedom, and were as such unnecessary to the vindication of the acts of the revolutionary Congress, it is evident that it did not come within the scope of the powers of that body to declare them, and that they have no force in affecting legal rights, either in the general law of the nation or in that of the several States.

§ 418. The doctrines of this state paper, except in their connection with political relations, never obtained the force of law by their promulgation therein, either in the national or State jurisdiction, nor have any legislative or judicial authorities, under the constitutional division of sovereign powers, ever recognized the instrument as affecting the previous foundation of the laws of personal condition in this country. The only occasion for regarding these propositions as a standard of conduct for private persons, is found in comparing them with the private relations and public career of those who subscribed them.<sup>1</sup>

The same remarks apply to the declaration of Congress, July 6, 1775, giving the reasons for taking up arms against the British Crown.

§ 419. There is apparently nothing in the signification of the Constitution, or of the public acts of the people of the United States in their united or national possession of sovereignty, which can be justly construed into a universal attribution of the rights of legal personality, or a voluntary abnegation of this power over personal condition ;<sup>2</sup> whatever recognition there may

<sup>1</sup> No written declaration of political principles can be construed or interpreted without reference to its actual correspondence with the acts and circumstances of its authors. In 1297, at a time when the King of England was, practically, an absolute monarch, and a large portion of the community were in a state of villenage, the writs issued by Edward I. for the assembling of a Parliament contained this sentence: "What concerns all should be supported by all, approved by all, and common danger should be repelled by all." From this public act some have argued a legal right thereafter to universal representation, or the right of every one not to be taxed without his consent. See Wade's History of the Middle and Working Classes, p. 450.

<sup>2</sup> Chief Justice Taney, in Dred Scott's case, 19 Howard, pp. 409, 410, citing these clauses in the declaration, can hardly be supposed to have intended to argue more from their existence than is argued in the text above: that is, only that they are not to be taken as a juridical act altering the status or civil condition of persons of African descent, as it then existed in the colonies. The Chief Justice refers, as has here been done, to the history of the times and of the authors of the instrument, to prove that they are not to be so interpreted. On page 410—"It is necessary to do this in order to determine whether the general terms used in the Constitution of the United States, as

be in the same instrument of rights in the people, as certain determinate masses of individuals, by those provisions which are of the nature of public and private *law*, or bills of rights, and are national in their jurisdiction or extent.

§ 420. The object of the Constitution is "to secure liberty to the people of the United States ;" but for that purpose it establishes a Government, and invests it with powers to act upon all persons within the United States ; and at the same time it acknowledges the possession of the residue of sovereign powers to be in the several States, or the several people of each State, as a distinct political personality. The liberty therefore which is recognized by the Constitution, in this declaration of its

to the rights of man and the rights of the people, was intended to include them, or to give to them or their posterity the benefit of any of its provisions."

But, from the mode of statement employed in the next sentence of the Opinion, it might seem that the Chief Justice was not satisfied with drawing only such a *negative* conclusion from those clauses, but found, in the *very expressions themselves*, a direct averment that negroes were not to be considered capable of legal rights, and even that they were property and not persons. For, having on the preceding pages cited the customary and statute law of the colonies and the empire recognizing slavery and the civil disabilities of free negroes, and having, just before the sentence above quoted, said : " We refer to these historical facts for the purpose of showing the fixed opinions concerning that race, upon which the statesmen of that day spoke and acted." He then (after the sentence first quoted) says : " The language of the Declaration of Independence is equally conclusive. It begins," &c.

If one says—" Feed oats to all my horses,"—it might be shown, *aliunde*, that he means only all his white horses. But it could hardly be concluded from the words themselves, that his black horses were not to have any. That the negative conclusion, in the text above, is the gist of the argument in the Opinion, appears further from page 110 : " The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day, would be so understood. But it is too clear to dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration ; for, if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with," &c. &c.

Much has been written respecting Mr. Jefferson's claim to originality in his part of the composition of the Declaration. But it may be noticed, that the excellence of the composition is, precisely, in its want of originality. It has been proved that the most striking expressions were only adoptions of forms of speech, which were familiar to all who had spoken or written on the issues of the Revolution, and chiefly derived from the writings of Locke, Shaftesbury, Algernon Sidney, and other writers of similar political opinions. It was, for *this reason*, a successful utterance of the ideas of the people of the colonies, (whatever may be thought of the philosophical accuracy of those ideas,) and not to be construed by the habits of thought of the Committee of Congress who reported it. If it had been original with that Committee, and if Mr. Jefferson, as is admitted, bore the principal part in its composition, it should be interpreted by his peculiar views. And that he, individually, gave a universal personal extent to such expressions, irrespective of distinctions of color or race, is abundantly proved from his written works.

object, comprehends the idea of law as well as of liberty ; and consists in *relations* wherein the *right* of one man is associated with the duty of forbearance in another ; and both right and duty are consequences of that relation of superior and inferior which is implied in every *law*, strictly so called. The Government of the United States being itself subject to the supreme power which establishes the Constitution, the liberty of individuals recognized by it may be said to consist in the restraints on the Government in the exercise of powers vested in it by law, as well as faculties of action in private persons ; although it is not necessary to infer from this language of the Constitution that liberty of condition is promulgated by it as by a personal law of universal application.

§ 421. The people of the United States, the authors of the Constitution, may also in the same instrument, by their joint action, restrain the exercise of the powers held by the States severally over individuals ; constituting therein a legal liberty for the persons subjected to those powers ; each State being thereafter bound by a duty of forbearance similar to that binding on the national Government ; though, from the intrinsic nature of its political existence, that duty, regarded as duty of the State in its political capacity, is rather the consequence of an international law or compact, than of a law in the strict sense ; while the liberties arising from it, to the individual, and the corresponding duties of all private persons are, in resting upon the Constitution, of a truly legal character, and are founded on a national municipal law, binding on all private persons as a law in the strict sense.

§ 422. The public law of the United States, determining the legal extent of the powers held by the national Government and the restrictions on the powers of the States, is therefore also private law in being the law of the liberty of private persons. The liberties of legal persons which might be guaranteed by the Constitution, and thus rest upon a law having both a territorial and a personal extent or character, are either political or civil.

The entire sovereignty of the United States, that is, the sum of the sovereign powers held by the States both unitedly

and severally, being recognized in the Constitution to be held by the people of those States, this sovereignty has the *national* character exclusively, as opposed to a *private* character, according to the distinction made in the use of those terms in a former chapter ;<sup>1</sup> and the law, in acknowledging that sovereignty, recognizes the possession of political rights by the individuals constituting the people ; while at the same time the possession of sovereignty by the people in their double political character—as one nation, and as separate political bodies,—is a fact antecedent to and lying at the foundation of all law in the primary sense,—all rules of action to be judicially recognized in this country as the positive law. The possession of those rights constitutes liberty in one of its forms of existence, viz., political liberty, as before defined ;<sup>2</sup> and is necessarily a private right in individuals, i. e., the right of a private person.

But in considering freedom of action in civil or social relations, as a topic of *private* law, political liberty needs not to be farther considered except so far as it is connected with civil liberty in being, necessarily, a legal attribution of the capacity for the rights of a legal person, and inconsistent with the condition of a *thing*, or of the *object* of the rights of others ; and also in supposing, in its possessors, a legal liberty of choice and action totally incompatible with the existence of an involuntary subjection, in social relations, to another person. This political liberty, as the right of the individual member of the civil state, is determined by some *law*, in the proper and ordinary sense ; and, for the present purpose, the most essential consideration in regard to it is the foundation upon which it rests, in the public law of the United States ; or the location of that power of sovereignty which originates that political right.

§ 423. If the possession of political liberty by individuals is not fixed, in the Constitution, by the national exercise of this power on the part of the people of the United States, (that is, by private law contained in the Constitution,) it must, under the constitutional distribution of power, be vested either in the

<sup>1</sup> *Ante*, § 354 and note.

<sup>2</sup> *Ante*, § 352.

national Government or in the several States. But though the possession of political rights by individuals is a fact which enters into the actual continuation of the national Government, and the exercise of those sovereign powers in and by the Constitution which, by the force of such exercise, constitute the people of the several States into one nation or state among the other "powers of the earth," there is nothing in the Constitution itself which determines who are the individuals that are to constitute the *political people* of that nation, or who are, in other words, to enjoy this liberty of action, in respect either to the political existence of the nation, or that of the several States. The only provisions in the Constitution which directly affect political rights or privileges, are those which limit the qualifications for office, or determine political capacities in respect to the organization of the national Government. These, in determining the instruments of supreme power, or the persons to whom it shall be intrusted, are public law as well as a law determining the rights of private individuals ; and, though they are material for securing political freedom to the people of the United States in their character of an embodied state or nationality, or, in other words, for maintaining the national possession of sovereignty in its present form, and hence, derivatively, for securing all individual freedom of action, they are not necessary to be here considered.

§ 424. Since therefore the possession of those rights of action which constitute political freedom in private persons must be determined by some who are vested with sovereign power, the power to determine that possession must either be vested in Congress or be reserved to the States respectively, or the people of those States, as together exercising the sum of sovereign legislative power not already exercised in the Constitution.

If the term "republican government" implies the possession of political liberties by any of those who are also individually subject to the supreme power of the state, the provision in the Constitution that the United States shall guarantee to every State of the Union a republican form of government,<sup>1</sup> taken in con-

<sup>1</sup> Art. IV. Sec. 4: "The United States shall guarantee to every State in this Union a republican form of government."



nection with the legislative powers vested in Congress, gives to the national Government, as the sole representative of the *United States*, some power to maintain in each State the political liberties of the individuals constituting the people of that State. But there is no power given to Congress to determine within a State, by a personal law, any specific possession of political rights, not even in the power to pass naturalization laws, that is, laws by which aliens to the dominion of the United States shall acquire the rights of a person born within that dominion. The possession of political liberty, as the right of a private person, is therefore, within each of the several States, determined, as an element of the political constitution both of the State and of the United States, by the will of that body of persons known as being, by the present possession and exercise of power, the political people of that State. They have the right to abridge or extend at their will the enjoyment of political liberty by individual inhabitants of their territory ; subject only to the effect of the provision for a republican government, and to those provisions of a *quasi*-international character which limit the power of the State over persons who are alien to their several jurisdiction.

Whatever may be the principles affecting the possession of political liberties by individuals, which natural reason and political right (ethics) require to be observed in states and nations, the juridical recognition of those principles,—whether they can be called doctrines of a historically known *law of nations*—universal jurisprudence—or not, is dependent on the sanction of the sovereign power vested in the several States ; except as affected by the above described provisions of the Constitution.

§ 425. The provisions of the Constitution, before referred to, which being of the nature of a *bill of rights*, constitute *private law*,<sup>1</sup> are a protection to the inhabitants of the United States only against the powers delegated to the national Government.<sup>2</sup>

<sup>1</sup> *Ante*, § 409, 410.

<sup>2</sup> Kent's Comm. Lect. XIX, in beginning : "As the Constitution of the United States was ordained and established by the people of the United States for their own government as a nation, and not for the government of the individual States, the

Similar provisions might have been made in the Constitution to restrain the powers of the States within their local jurisdictions. But the only existing clauses which limit their *municipal* (internal) legislation, (distinguished from *international* in respect to the persons upon whom it operates,) affect, principally, either those rights of persons which are classed as the rights of persons to things—rights of things—or those which have more of the character of public law, by their connection with the political action of the national Government, than of a law of private relations. Such are the provisions of Art. I., Sec. 10. The provisions which more directly affect the powers of the several States, in reference to the individual and relative rights of persons within their limits, are such as properly form an international or *quasi*-international law between the various States and the Government of the United States, as the several possessors of sovereign powers, to be exercised locally in the separate jurisdictions of the States or Territories. They affect the rights or obligations of private persons, within those several States or Territories, when recognized therein as aliens in respect to their local municipal laws. Thus the clauses of the fourth Article relating to those who within any State are aliens only to the State, but not to the United States and to the jurisdiction of the national Government, form a special law ; limiting the powers of the States over such persons, with a coercive force beyond that of the general principles of international law, which may yet operate, in like circumstances, as between those States. The powers exclusively granted to the national Government over such public action as constitutes the peaceful or hostile intercourse of the nation with other nations, limit also, to a certain extent, the power of the States over those within their boundaries who are aliens to the United States.

§ 426. If there are any legal rights or liberties and legal duties or obligations which have hitherto been attributed to persons within the United States by virtue of principles judi-

powers conferred and the limitations on power contained in that instrument, are applicable to the Government of the United States, and the limitations do not apply to the State Governments, unless expressed in terms. Thus, for instance," &c.

cially received as parts either of the "common law," or of the historical *law of nations* or a universal jurisprudence, but which are not fixed by the provisions of the Constitution before referred to, having the effect of private law, the principles determining those rights will be alterable either by the national legislature or by the several States, according to the connection which the *action*, contemplated in those rights and privileges or duties and obligations, may have with the *powers* respectively vested in the general Government or reserved to the States.

§ 427. It has been a question of great interest and importance in the jurisprudence of the United States whether the "common law," meaning thereby the common law of England transferred to the American colonies, is the law of the United States in their national or federal exercise of sovereign power; or, in other words, whether it exists, in the United States, as the judicially supposed will<sup>1</sup> of that sovereignty which is represented by the national Government, and therefore is a law, having national effect or prevalence, which is to be administered by the judicial and executive officers of that Government.

Referring to principles already stated as those which determine the existence of laws within the jurisdiction or domain of any sovereign power: all positive law is law resting on the will of some possessor of sovereign power; and has force and application both in some certain territory and over some certain persons, i. e., is territorial and personal,<sup>2</sup> and the only laws which can be judicially recognized in any territory and applied to persons therein, as the will of the sovereign, are either such as in judicial recognition can be known to have had territorial extent therein, to be shown by historical evidence, or such as may afterwards originate either by the continuous judicial application of natural reason, or by the direct promulgation of the sovereign legislative power. Now it has been shown that private law prevailed in the colonies as the law of each separate colonial territory, (though maintained therein, to a certain extent, by

<sup>1</sup> *Ante*, §§ 29, 30.

<sup>2</sup> *Ante*, § 26.

the imperial authority,) and not as the single law of several parts of an integral national domain ; or (if in any degree otherwise) that the only extent to which any private law prevailed nationally, was as a *personal* law, attaching to the British subject of European race, and then having a *quasi*-international effect in respect to those districts in which he had no local or particular domicil.<sup>1</sup> It follows, then, from the necessarily continuous existence of private law, that the Revolution and the consequent assumptions of power by the people of the colonies, in preserving and confirming the distributive possession of sovereign powers for local legislation, maintained that local character of the common law ; or, in other words, that the only “common law” judicially known at the adoption of the Constitution of the United States was known in each State as a local territorial law.

§ 428. The term *common law* being here taken in that wider sense in which it may be employed in the jurisprudence of any country<sup>2</sup> and not merely as those rules which are identical with the “common law of England,” it may be said that the only other law which can exist in the United States must be such as is promulgated by the direct legislation of the possessors or depositaries of sovereign power, and that the only legislation having national extent is that contained in the Constitution, or proceeding from the exercise of those powers, having a national extent, which are vested by it in Congress. So far as the Constitution employs words whose meaning is ascertained by their previous use as terms of the “common law,” so far it may be said to adopt the “common law” in the legislation expressed by those terms ; and it will always be necessary to refer to “common law” expositions of those terms to give effect to the Constitution. But there is nothing in the Constitution making the body of principles known, either in any State or States of the Union or in England, as “common law” a law promulgated by the authors of that Constitution. Law in any state is a rule of action founded on a right or power over such

*Ante*, § 35.

<sup>2</sup> *Ante*, § 324–326, and the references.

action ; and common law in any State of the Union is therein the supposed will of the State sovereignty in reference to an immense variety of action. Its identification with the State a local sovereignty is inferred from the fact, that by the Constitution of the United States the State has power to control action in those possible natural relations which are now or have been determined by rules judicially known as "common law rules." But the powers of the national Government over the action of persons, within the limits of the *States* at least, are derived by specific grants, and to suppose that the common law is a rule of action enforceable by that Government would be to attribute a rule of action to its authority, without reference to the nature of its powers to make a rule. Congress, in the exercise of its legislative powers, might adopt a rule previously expressed in "common law ;" but the extent and force of that adoption would be limited by the grant of power in the Constitution. "Common law," therefore, is not the *territorial* law of the United States as one domain, even if any system of rules is recognized as common law, distinct from the juridical will of some one State of the Union in which the English law of the individual and relative rights of private persons has, in a modified form, acquired a territorial extent.

§ 429. But laws apply as *personal* laws as well as territorial laws ; or, have a personal extent which may be distinguished from their territorial extent ; and where the national Government has power to administer law between persons (from a grant of power over them as specified persons) without reference to the administration of any particular system of laws, if those persons have sustained relations under the law, having territorial extent in some State, which is in such State known as "common law," there the national Government may be said to have a common law jurisdiction, in applying it to persons over whom it has this personal jurisdiction.

Thus the judicial power of the United States, applying to *cases*, is described by cases *under certain laws*, and cases *between certain persons*. Although the laws under which the first class of cases may arise are only the law contained in the Con-

stitution, treaties, and the legislation of Congress, the cases between persons may be cases at common law ; in which instances the common law enforced by the national judiciary will be the law of the local domain under which the person, upon whom the national jurisdiction has attached, may have sustained relations and have acquired rights or incurred obligations.<sup>1</sup>

§ 430. If the common law in any jurisdiction is that law which is judicially recognized as the rule of natural reason,<sup>2</sup> it might appear strange that such a law should not be a part of the national municipal law. But it is to be remembered that the legal coercive effect of the common law of England or of any State of the Union does not depend upon its actual accordance with natural reason, but upon its acceptation as such by the possessor of sovereign power. Now the United States have established a *national* rule only in regard to certain specified matters or relations. It is, therefore, as to such only that the national judiciary can enforce a rule of action, however derived, either from a legislative act, or from a judicial interpretation of natural reason. As to such only can the judiciary apply natural reason according to standards identified with the will of the United States as one nation. But, in considering the jurisdiction of the national judiciary over persons and the laws which it may apply, a distinction is to be made between their having authority to ascertain the rule of natural reason applying to certain relations or conditions of action, and their having authority to enforce a rule over certain persons which is derived from natural reason by, or according to the judgment of, another possessor of sovereign power, not identified with the United States in their national capacity. Before any rule derived by a judicial reference to natural reason can be enforced by the national Government it must be identified either with the will of the United States, or with that of some single State ; and the criterion of those matters or relations as to which the United States can be taken to have given a rule of action is in the Constitution only.<sup>3</sup>

<sup>1</sup> *Ante*, § 368. Duponceau on Jurisdiction, p. 47.

<sup>2</sup> *Ante*, § 35.

<sup>3</sup> The question, here made, is of the law by which civil rights and obligations may be created or become existent ; and whenever in the national jurisprudence they are

§ 431. Common law then (including herein the *law of nations*, *jus gentium* or universal jurisprudence, so far as it is a law of personal condition<sup>1</sup>) is in each State alterable only by the State power; except so far as limited by the constitutional provisions before referred to.

If, as has sometimes been asserted, Christianity, or the code of morals known as the Christian, ever had legal effect either as part of the "common law of England" and America or of the *law of nations* among nations called Christian,<sup>2</sup> its continuance, with legal authority in determining the relations and rights of persons, is not maintained by any constitutional provisions giving it the effect of a national law for the United States. And, whatever may be the degree of correspondence between that code and the existing laws of the United States, its recognition as a judicial rule within any State of the Union depends solely on the separate sovereignty of the State.

§ 432. How far the "common law" may be a national law, in the sense of a law resting on the power represented by the national Government in the Territories, District of Columbia, &c., is a question of that one of the *local* municipal laws, as before defined, which may therein prevail. Because those Territories, &c., are, in reference to the rest of the Union and in point of severalty of jurisdiction, like the several States.<sup>3</sup>

recognized as effects of common law, that law is also known as local municipal law. This is the general rule, at least as to those rights and obligations which constitute the personal condition or status of private persons. But when the judicial power of the U. S. is exercised, under the Constitution, to actualize or realize (*ante*, p. 59, n.) those effects, the national courts must (in the absence of statute) adopt a rule of law and reason determined by general principles of jurisprudence. (*Ante*, §§ 29-36, 71.) This must be a customary or common law identified with the juridical will of the nation, the authors of the Constitution, and not with that of any one of the local legislatures. So, when "cases at law and equity" arising under this Constitution, &c., are to be decided in the national tribunals, the cases are to be distinguished according to the jurisprudence of England as familiarly known here, (Story's Comm. § 1645, and the rules of remedy are not the practice of some State, "but according to the principles of common law and equity as distinguished and defined in that country in which we derived our knowledge of those principles." (Robinson v. Campbell, Wheaton, 212, 221, 223; 1 Kent, 342.) So that there is a sense in which a national common law may be said to exist and be adopted by the Constitution to the extent making it "a rule in the pursuit of remedial justice in the courts of the Union" (Story's Comm. § 1645 and § 158. note.) Whether the courts of the Union have jurisdiction to punish acts which, though not made ~~unlawful~~ by Congress, are criminal by such a national com-

Kent's Comm. Lect. xvi; Rawls on the

Tucker's Bl App. E.

<sup>1</sup> *Ante*, § 110.

<sup>2</sup> *Ante*, § 1



§ 433. There is therefore nothing in the Constitution of the United States which (either by abnegation of the power to establish a chattel condition as a personal distinction, or by attributing the legal rights of persons to all mankind, or by an adoption of the English "common law" in respect to individual and relative rights as a national and territorial law) determines the civil condition or *status* of natural persons under a law having national extent, to be recognized throughout the dominion of the United States and to be enforced by the national Government.

Further, the powers specifically granted to Congress, for enacting laws to have national extent, are not of such a nature as to determine those rights of persons the possession or non-possession of which is the most important element of a free condition or of its contraries; that is, *individual* rights,<sup>1</sup> even independently of those restrictions on the national Government which have the character of a bill of rights; and even the personal application of the reservations against the powers of the national Government, in favor of specified rights of private persons, is not determined by the Constitution itself.

§ 434. On the other hand the restrictions in the Constitution of the United States, on the powers held by the States severally, are not of such a nature as to limit their power in the creation of local law affecting private rights, except in a few relations, not embracing those rights which distinguish a legal *status* or *condition* of persons, and in certain specified international and *quasi*-international relations. The power therefore of determining by personal laws the *condition* of individuals and their enjoyment of civil liberties belongs to the States, as the proper object of their own municipal (internal) law, under that power of reservation of powers to the States severally, subject to the national guarantee of the Constitution in its application. The power which remains in them is the determined effect of the national government, and restrained, by the national international obligation, to the same *law* (in the strict and proper sense) having similar effect with the national law.

§ 435. The power over civil liberty and the legal possession of the rights of private persons being, to this degree, within the powers of the States severally, they, by their own local law, determine within their own territory even the personal application of the constitutional reservations in favor of "the people" against the powers of the national Government ; that is, it would seem that in each State it remains for the State to determine who constitute the individuals of that "people" who, by legal capacity for the rights referred to in those provisions, are not to be prohibited by the national Government "from assembling peaceably for the redress of grievances," whose "right to keep and bear arms shall not be infringed," who are to be "secure in their persons, houses, and possessions against unreasonable search or seizure."<sup>1</sup> For since the legal unreasonableness of a search or seizure depends upon the *legal nature* of the rights of personal liberty, personal security, and private property, (where distinctions can be made between natural persons according to the degree in which they possess those rights,) if the States determine the legal capacity of persons, that determination will operate in reference to the judicial and executive powers of the national Government, when they act upon the same persons. And even supposing that no law of Congress had been made, or could be made, to affect relations founded on such personal distinctions, yet it may be supposed that the constitutional obligation of the United States, to maintain by force the domestic tranquillity of each State, might give occasion for the recognition of those distinctions by the national executive and judiciary.<sup>2</sup>

§ 436. During the connection of the American colonies with the British empire, as before shown, the common law rights of Englishmen were established, by that law, for the white inhabitants, at least, of each colony, by the imperial as well as the local sovereignty ; and the same law, as personal to those colo-

<sup>1</sup> Art. I., II., IV., of Amendments.

<sup>2</sup> Art. IV. sec. 4. "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature or of the executive, (when the legislature cannot be convened,) against domestic violence."

nists, had a territorial extent and recognition throughout the colonies as one national dominion, irrespectively of the local legislature, and that personal law or those personal rights were guaranteed by the united power of the empire. But there being nothing in the Constitution, except as above stated, to limit the powers of the States in affecting or altering "common law rights" by their municipal (internal) laws, it seems that the rights or liberties of private persons have no longer the same basis in the undivided sovereignty of a *nation*, as formerly ; and, therefore, not the *same* security for their permanence in a State of the Union as formerly in the colony ; the power to affect those liberties having passed into the States as divided into distinct political bodies of local jurisdiction, irrespectively of the sovereignty existing in the States united, except where controlled by the provisions of a *quasi*-international character.

Whether civil or social liberty has, in consequence of this political change, a better or a worse foundation in the present United States than in the former colonies of Great Britain, is an inquiry which is not embraced in that legal view of the subject which is herein taken.

## CHAPTER XV.

### OF THE NATIONAL MUNICIPAL LAW OF THE UNITED STATES— THE SUBJECT CONTINUED—OF THE PERSONS WHO MAY AP- PLY THAT LAW BY THE EXERCISE OF JUDICIAL POWER.

§ 437. Under every form of government the investiture of the power to apply the law is a circumstance to be considered in determining those conditions of private persons which may be established under law. It may here be assumed that, in a republican government, this power should always be distinguished, in its exercise, from the power to promulgate laws—the legislative or juridical power. The coercive application of the laws of a country is by the instrumentality of ministerial or administrative functionaries co-operating with the judicial. It may be difficult to distinguish, in every instance, between the persons so co-operating, as being either administrative or judicial officers. But in a government wherein the three functions of sovereign power are separately invested, the judicial function becomes the test of the administrative or ministerial.<sup>1</sup>

§ 438. Whatever may be the intended operation of the national municipal law of the United States in causing rights or obligations, incident to conditions of freedom or its contraries, in

<sup>1</sup> But legislative assemblies are considered as holding the judicial function to a certain extent, (1 Peters' R. 668,) with the powers incident to courts of law; in the exercise of which their judgment is final, whether the occasion for it arose in the course of the legislative or of some other function. Cushing's Law of Legislative Assemblies Part III. ch. iii, iv. In 2 Kent's Comm. 30, note, the author seems to think that the American legislative bodies are (in the absence of any constitutional provisions) uncontrollable in this respect as the English houses of parliament.

private persons, the investiture of the judicial function, by which its application as a coercive rule is to be determined, is an important incident of those conditions.

In the previous chapter it was necessary to consider the relative extent of the judicial functions derived from the United States and from the several States, in applying the Constitution operating as the supreme public law and the evidence of the location of sovereign juridical power. The question, of *jurisdiction* under the national municipal law, which is here presented, is also a question of the public law ; although here regarded, mainly, as one of private law ; that is, one in reference to the relations of private persons.

§ 439. This question, respecting the exercise of the judicial function in carrying into effect the national municipal law, arises from the fact that, within the limits of each State of the Union, the sum of sovereign power over the territory of such State and all persons and things therein is divided between the particular State and the national Government of the United States in their national capacity ; and that, since the powers held by each are sovereign in their nature, the governmental organization of each must include tribunals for the execution of the law derived from the powers so held by it.

Now, though the tribunals thus constituted by these co-ordinate possessors of sovereignty have jurisdiction over the same territory and the same persons, the tribunals deriving their authority from one of them will not, necessarily, have the power to apply the law proceeding from the juridical powers held by the other.

§ 440. Since the three functions of political power must be united in the hands of its ultimate possessor, (if it is sovereign political power,)<sup>1</sup> it is evident that, in order that the powers of each of these two political entities or personalities may be actually sovereign and independent, the judicial function, for the administration of the law proceeding from either, must be exercised by its own instruments. By the concurrence indeed of the two political sources of law, the tribunals ap-

<sup>1</sup> *Ante*, p. 424.

pointed by either one might administer the law derived from the legislative or juridical power of the other ; in which case the judicial function of each would merely be exercised by the same persons ; while still having an essentially independent political existence, or being still derived from different political sources.

§ 441. If this question of the exercise of judicial power in applying the national municipal law be thus made with reference to the jurisdiction of the State courts, it becomes equally a question of the local municipal law of those States, the subject of the next chapter ; as it is here a question of the national law.

§ 442. The law, whose judicial application is to be here considered, includes that which has an international effect between the States, (being herein distinguished from other portions of the national law by the character of the persons to whom it applies,) and which is to be separately considered, in succeeding chapters, under the name of the *domestic international* law of the United States ; or, at least, it includes that portion of that international law which has a *quasi*-international effect between the States, in being derived from the Constitution and identified with the national municipal law in its *authority*.<sup>1</sup>

§ 443. In the sixth Article of the Constitution of the United States it is declared, that “ this Constitution and the laws of Congress made in accordance with it shall be the supreme law of the land, and all State courts shall be bound by it, any thing in the laws of the States to the contrary notwithstanding.” And since the several States, or the people of the States, who within their several State limits possess in severalty certain sovereign powers, united in establishing the Constitution of the United States and in authorizing Congress to legislate, for certain purposes, with national extent, it might be argued, from this fact alone, that the national municipal law is the legislative will of each several possessor of *State* power.<sup>2</sup> It would seem, therefore, that the judicial tribunals under that *State* power would have jurisdic-

<sup>1</sup> *Ante*, § 402, 1.

<sup>2</sup> 1 Calhoun's Works, p. 252.

tion to apply the national law, as well as the law which rests solely on the separate (reserved) powers of that State, whenever the persons and things affected by such national law should be found within the territorial forum of their jurisdiction.

§ 444. But in establishing the Constitution of the United States and in so exercising power jointly, or as one nation, the people of the United States have created a Government and invested the powers held by them jointly, or in their national capacity, in that Government; to be exercised by the three functions of sovereignty, as powers originally sovereign in its hands.<sup>1</sup> Now, in order that the judicial function of the national Government in reference to the national law may be independent of any application of that function derived from the State powers, it is evident that the national Government must have an entire possession or exercise of such judicial power as is requisite for the application of the national law, and, hence, the power, at its option, of exercising it by instruments of its own appointment.

The several States and the Government of the United States are altogether distinct in the possession of their legislative or juridical powers over the action of private persons, and the law (private law) proceeding from the one must be judicially administered independently of the judicial function held by the other. Or, if the laws resting on the powers of the United States and the laws resting on the powers of the several States may, within the territorial jurisdiction of a State, be together administered by the tribunals of either one, such exercise of the judicial power must be supposed to be consistent with the admitted distribution of sovereign power between the two sources of law which is evidenced by the Constitution of the United States.

§ 445. An exception to this may be supposed to exist under the clause in the second section of the third Article, which describes the judicial power, vested in the Supreme Court and such inferior courts as Congress may establish, as extending to cases between certain persons; since such cases may involve the determination of rights and obligations as legal effects origi-

<sup>1</sup> *Ante*, §. 360.



nating under, or created by or made to exist by the juridical exercise of State powers.<sup>1</sup>

But there is not here any actual exception, since, by the determination of the extent of the national judicial power, the rule which governs these cases only becomes identified in *authority* with the national law, though it may have originated in the juridical will of one of the States; and, when applied in such a case, it takes effect as, or may be classified under, the *quasi*-international law (a part of the national law) by the character of the persons upon whom it acts, or whose rights and obligations it determines. The rule of action determining the rights and obligations of private persons in these cases is still supposed to be taken by the national judiciary as one resting on the several legislative (juridical) will of a State.<sup>2</sup>

<sup>1</sup> *Ante*, §§ 368, 429.

<sup>2</sup> Judiciary act of 1789, sec. 34, 1 Stat. at Large, 81, Brightly's Digest, 732, and cases cited; 1 Kent's Comm. 342, note. The rule applies with particular force where "rights of person and property," or *individual* rights, are to be determined. *C. S. v. Wonson*, 1 Gallison, 18; *Mayer v. Foulkrod*, 4 Wash. C. C. R. 349, 355; *Campbell v. Claudius*, Peters' C. C. R. 484. The authorities concur that the national judiciary will regard the State courts as the best expositors of the State's law or juridical will. See those above, and *Elmendorf v. Taylor*, 10 Wheaton, 159; *Mr. Clay*, in *Groves v. Slaughter*, 15 Peters, 485; *Strader v. Graham*, 10 Howard, 82, 93; *Dred Scott's case*, 19 Howard, 452, 459, 465, 547, 557, 603. But, unless the decision of the court in the last-named case be an exception, it has not been held either that the national judiciary must regard a decision of a State court in reference to the same facts and persons as a controlling exposition of the State law to be applied, or that it will accept the latest decision of the State court (compared with earlier State authorities) as the ruling criterion of that law.

In that case, the Justices who concurred in the decision of the court seem to have held, (with Ch. Justice Taney, p. 453, and Mr. Justice Nelson, p. 465,) that the court below (the U. S. C. C.) and the State court (in 15 Missouri R. 576,) had correctly interpreted the law (juridical will) of the State in such cases. The dissenting justices (McLean, p. 547-557, and Curtis, p. 594-604,) held that the State law had not been properly understood.

This point of the case will be further examined hereinafter, as a question under one branch of the domestic international law, (*ante*, § 402; 2.) But it may be noticed here that, in the State court, the two concurring Justices seem to have admitted (with the other judge, Gamble, C. J.) that both the private international law which, as prevailing among nations, customarily obtains judicial recognition in every forum, (*ante*, § 258,) and the earlier Missouri cases supported a different judgment; that they expressly based their decision on that idea, of deciding what *comity* does or does not require from the State, the inadmissibility of which was urged in the second chapter, (§§ 81-85.) and, declaring "that times are not as they were when the former decisions on the subject were made," they derive positive private law from their personal views of the *comity* obligations of the State, in reference to the external action, legislative and political, of other States and their inhabitants; (15 Missouri R. 682; 19 Howard, 552.) It was in reference to these "fundamental principles of private international law," and "principles of universal jurisprudence," that Mr. Justice Curtis especially urged, (pp. 594.

§ 446. The application of the national law must, on the above argument, be ultimately determinable by the national judiciary ; yet it has been shown that of necessity every judicial officer in the United States applies the Constitution, operating as public law, in recognizing the validity of any rule which he may apply as private law ; and State courts are, therefore, bound to apply the national municipal law, at least, so far as it is public law ; but of this application the national judiciary must be regarded as the supreme or final arbiter, at least, in reference to the action of private persons, and with those limitations which arise from the manner in which sovereign power is distributed among the United and several States.<sup>1</sup>

§ 447. But though certain action or the relations of private persons in certain circumstances of natural and civil condition, and therefore certain classes of rights and obligations, are determined by the Constitution, or are determinable by the legislation of Congress, and thus are dependent on the national municipal law and subject to the judicial power of the United States, yet, if the legislative (juridical) will of a several State may sustain a rule in reference to the same action or relations of private persons, such a rule would necessarily be applicable by tribunals holding the judicial power of the State. And it would appear that such a judicial enforcement of the juridical will of the State will not derogate from any of the functions of the national Government in exercising the national powers, the powers belonging to the United States ; if it is admitted that

602, 603,) that the doctrine of the State court should not be taken as the law of the State nor be applied as part of the private international law of the United States.

Where a question arises under that *quasi*-international law which is in *authority* identified with the national will, (*ante*, § 402, 1,) it is evident that the national judiciary is not to follow an international rule identified with the will of some one of the States only. For this reason, apparently, it has been held that the local law of a State is not to be adopted in the construction of contracts and questions of commercial law. *Swift v. Tyson*, 16 Peters, 1, 19 ; *Carpenter v. Providence Ins. Co.*, Ib. 495, 511 ; *Rowan v. Runnels*, 5 Howard, 134 ; *Watson v. Tarpley*, 18 How. 520 ; *Gloucester Ins. Co. v. Younger*, 2 Curtis C. 322. In *Dred Scott's* case, 19 How. 603, Mr. Justice Curtis held, that there were questions of status involved which, arising exclusively "under the Constitution and laws of the United States, this court, under the Constitution and laws of the United States, has the rightful authority finally to decide."

<sup>1</sup> *Ante*, §§ 365-367. *Martin v. Hunter*, 1 Wheaton, 340-351.

the rule emanating from the State shall never interfere with the operation of that which emanates from the national powers.

Unless, therefore, the powers of the national Government have been, in the Constitution, declared to be exclusive in reference to such action, or the exercise of a like power by a State would be inconsistent with the exercise of the powers vested in the national Government, the law of the State, i. e., a rule resting for its *authority* on the State's several share of power, might be applied to the same action or relations, and, necessarily, by the exercise of its own judicial power.<sup>1</sup> But it is to be observed, that no rule could properly be thus attributed to the legislative (juridical) will of the State unless the action or relations affected by it exist in reference to circumstances which would have been within the actual power or sovereignty of the State, if it had never formed one of the United States, or had become, at the Revolution, and continued to be a State holding the sum of sovereign power; or, (to use language appropriate to a particular view of the national history) circumstances in which the State possessed jurisdiction "originally" or "previous to the Constitution."<sup>2</sup>

In order that the powers held by the national Government in reference to any action or relations may be supreme in their nature, it must have the power of making the national judiciary the supreme, at least, if not the exclusive judicial criterion of the legal nature of such action or relations. But if Congress has not thus made the national judicial power the exclusive criterion,<sup>3</sup> the State courts will, in the case supposed, have a con-

<sup>1</sup> *Houston v. Moore*, 5 Wheaton, 26, 34; *Fox v. State of Ohio*, 5 Howard, 410, McLean, J., dissenting, as in *Moore v. State of Illinois*, 14 How. 21, involving constitutionality of State law punishing the secreting of fugitive slaves, (in State court, *Eells v. The People*, 4 Scammon's R. 498,) where the decision of the Supr. Court in *Prigg's case*, 16 Peters', 539, against the validity of State legislation regarding fugitive slaves was urged as authority. 1 Kent's Comm. 383-396; Curtis' Comm. §§ 119-122, 132-142; *Teal v. Felton*, 12 Howard, 234, 202.

<sup>2</sup> *Federalist*, No. 82; Story's Comm. §§ 1751-1754; *Martin v. Hunter*, 1 Wheaton, 337.

<sup>3</sup> The same authorities. In theory, the rule may be that Congress can always make the national jurisdiction exclusive in cases where there would otherwise be a concurrent jurisdiction. But since the limits of concurrent jurisdiction are hardly determinable, except as cases arise in practice, the limits of a possibly exclusive national jurisdiction will always be undetermined. Compare Rawle, p. 205, note.

current jurisdiction with the national judiciary, though applying a rule resting on its own sovereignty and identified with its own local law. And it might be said that they will exercise *concurrent judicial* power. But, strictly speaking, it is here the legislative (juridical) will of the State (exercised by its three functions) which is manifested concurrently with the national legislative (juridical) power, (also exercised by its three functions.)

§ 448. Thus, in reference to ordinary civil relations, the State courts may have concurrent jurisdiction to enforce certain obligations or maintain certain rights. And, even in reference to action which is the subject of judicial cognizance as being criminal against a certain political sovereign, it has been held that the State court may have concurrent jurisdiction to punish the act when made criminal by State law, even though a definitive punitive law may have been enacted by Congress.<sup>1</sup> For, though it is truly said that criminal jurisdiction can be exercised only by a court instituted by the civil power which has declared the act to be a crime, and one whose executive may pardon the offence,<sup>2</sup> the act may be against the declared will of each possessor of power. In these instances, however, the compatibility of the State law with the exercise of power vested in the national Government must be determinable by the judicial power of the United States invested in their properly constituted courts; that is to say, the national judiciary will not have a superior jurisdiction to the State courts in reference to the application of the rule (private law) resting on the will of the several State, but will have jurisdiction (applying the Constitution as public law) to decide whether the application of the State law is consistent with the independent exercise of the national authority in reference to the same action or relations.<sup>3</sup>

<sup>1</sup> *Houston v. Moore*, 5 Wheaton, p. 26, 24, 34; *Teal v. Felton*, 12 Howard, 284, 292; *Curtis' Comm.* §§ 119–122. State laws punishing the offence of circulating counterfeit coin of the U. S. may be enforced on the ground that counterfeiting the coin of the U. S. and circulating such coin are distinct offences. *Fox v. State of Ohio*, 5 Howard, 410; *State v. Tuff*, 2 Bailey S. C. Rep. 44; *Commonw. v. Fuller*, 8 Metcalf, 313; *State v. Randall*, 2 Aikin's Rep. 89; 1 Kent's Comm. 398, and 404, note.

<sup>2</sup> 1 Kent's Comm. 403.

<sup>3</sup> *Federalist*, No. 82; *Martin v. Hunter*, 1 Wheaton, 340–351; *Cohens v. Virginia*, 6 Wheaton, 413; *Sturges v. Crowninshield*, 4 Wheaton, 192; *Story's Comm.* §§ 1731–1747; *Curtis' Comm.* §§ 115–119; *Duponcean on Jur.* 80.

§ 449. It is evident that the possession or enjoyment of individual (absolute<sup>1</sup>) rights, as incident to some relations between natural persons, must be determinable by the powers of civil or criminal jurisdiction delegated to the national Government for the execution of specified objects, and that, therefore, in such cases the judicial power of the United States must be supreme in determining the possession of these rights. But since the possession of these rights must have been within the "original," ordinary or general jurisdiction of the States, independently of the formation of the present national Constitution, and since no general power to determine the possession of these rights has been delegated to the national Government,<sup>2</sup> there is a presumption that their possession or non-possession is now dependent upon the juridical will of the State in which the persons claiming them may be found.

It would appear, therefore, that the judicial power of the States, at least in applying the Constitution as public law, must always be concurrently exercised wherever these rights are claimed or denied; the decision made in the exercise of that power being subordinate to the national judiciary, applying the private law derived from the national branch of powers where the question is made under such law, and also applying the Constitution as public law to determine whether the rights in question are dependent on the powers held by the national Government.

§ 450. Although the earlier cases show a difference of opinion on this topic, these principles seem to have been recognized, by a great weight of authority, in reference to the right of personal liberty. Thus, in cases of enlistment into the army of the United States, it seems now to be settled that the State courts will, under *habeas corpus*, or by the writ *de homine replegiando*, try the question of unlawful imprisonment, when it is "by an officer of the United States, by color or under pretext of the authority of the United States." Kent says, that the question in favor of a concurrent jurisdiction in such cases is settled in the

<sup>1</sup> *Ante*, § 40.

<sup>2</sup> *Ante*, § 433.

State of New York, and that "there has been a similar decision and practice by the courts of other States."<sup>1</sup>

So in other cases of the deprivation of that right under color or pretext of the authority of the United States, as where persons have been detained under suspicion of treason against the United States,<sup>2</sup> or as alien enemies,<sup>3</sup> or for violations of the laws of Congress,<sup>4</sup> and on other causes of imprisonment.<sup>5</sup> So the State courts have issued the writ of *habeas corpus*, in cases of persons detained for extradition under treaties between the United States and foreign governments.<sup>6</sup> And the same concurrent jurisdiction has always been claimed by the State courts in cases of persons detained or committed as fugitives from justice or from labor under the authority of the United States.<sup>7</sup>

<sup>1</sup> 1 Kent's Comm. 401, and in the matter of Stacy, 10 Johnson's R. 328. In the previous case of Ferguson, 9 Johns. 239, Kent, C. J., was of opinion that the State courts had no jurisdiction by *habeas corpus* where the detention was under color of authority of the U. S.; Thompson, J., dissenting; other judges reserving the question as the case was decided on another ground. *Commonw. v. Harrison*, 11 Mass. Rep. 63; *Commonw. v. Cushing*, *ibid.* 67; *Commonw. v. Murray*, 4 Binney, 487; *Commonw. v. Fox*, 7 Barr's R. Pennsylv. 336; Carlton's case, 7 Cowen, 47; Roberts' case, in 1809, was against issuing the writ; Sergeant's Const. Law, 288; 2 Hall's Law Journal, 195.

<sup>2</sup> *Commonw. v. Holloway*, 5 Binney, 512, the power to discharge or hold to bail claimed, except where death would be the punishment under the statute.

<sup>3</sup> Case of Lockington, 5 Hall's Law Journ. 92, 313; 5 of same, 301-330.

<sup>4</sup> Case of Joseph Almeida, in Maryland, 12 Niles' Weekly Reg. 115, 231. Cases of Booth and Rycraft, (1854;); 3 Wisconsin R. 1.

<sup>5</sup> *Ex parte* Sergeant, by Tilghman, C. J., 8 Hall's Law Journ. 206; *Ex parte* Pool and others, Nat. Intell. Nov. 10, Dec. 11, 1821.

The earlier cases are noted here from Sergeant's Const. Law, p. 282-287: where also the opinion of Judge Cheves of South Carolina, in *Ex parte* Andrew Rhodes, 12 Niles' W. R. 264, (1819,) as against the concurrent jurisdiction is noted.

Whether the State courts can inquire into imprisonments ordered by the Houses of Congress, is a question of the extent of the judicial power as compared with privileges necessary to the independent exercise of the co-ordinate legislative function. *Ante*, p. 487, note.

<sup>6</sup> Metzger's case, where the prisoner had been committed by a U. S. district judge, (Supreme court, N. Y., 1847, Edmonds, J.,) 1 Barbour, 248; Heilbonn's case, where the commitment was by a U. S. commissioner, (same court, 1853, Mitchell, J.,) 1 Parker's Criminal Reports, 429. But compare 6 Opinions of U. S. Att'y General, p. 239.

<sup>7</sup> *Commw. v. Holloway*, (1816,) 2 Serg. and Rawle, 305; case of George Kirk, Oct. 1846, 4 N. Y. Legal Observer, 456; case of Joseph Belt, Dec. 1848, 7 of same, 8, before Judge Edmonds, N. Y. Supreme Court; Sims' case, 7 Cushing, 285.

The decisions, in this class of cases, which maintain the claimant's possession under the acts of Congress do not, necessarily, also deny this concurrent jurisdiction of State courts to inquire into the lawfulness of the restraint exercised under color of those acts. Such power in the State courts seems to have been admitted in *Wright v. Deacon*, 5 Serg. and Rawle, 62, and *Jack v. Martin*, 12 Wendell, 311 and 14 Wendell, 507, where the detention was justified.

In Jenkins' case, (otherwise known as the Wilkesbarre slave case,) in 1853, 2 Wallace, jr., 526, Judge Grier thus stated the general rule: "But State courts and judges



§ 451. Thus far, in considering (in the last two sections) by whom the national municipal law may be applied, the question of concurrent judicial power exercised by State courts has been presented as subordinate to that of concurrent legislative (juridical) State power as manifested by its three functions, including the judicial. But there is another form in which the question of concurrent judicial power arises more distinctly.<sup>1</sup>

In the exposition given, in the second chapter, of those elementary principles which take effect as private international law, it was shown that the tribunals of one national jurisdiction may recognize the effects (rights and obligations) created by laws which have originated in the juridical will of a foreign possessor of sovereign power, when the persons come within that jurisdiction who have sustained relations caused by anterior subjection to those laws. By applying these principles, it might be held, in many cases, that the State courts would, in the exercise of the judicial power of the several States, have authority to enforce the laws of Congress, (criminal laws, perhaps, being excepted,<sup>2</sup>) when the persons are within the territorial jurisdiction

have no power, under a *habeas corpus*, to review or sit in error upon the judgment or process of the *judicial* officers of the United States acting within the jurisdiction committed to them, as has sometimes been done;" and held that the State courts had no concurrent jurisdiction in these cases; applying the rule with an assumption that the law of Congress, of 1850, in making the certificate of a commissioner or a judge of the United States, "conclusive evidence of the right of the person or persons in whose favor it is granted to remove such fugitive," and forbidding "all molestation of such person or persons by any process issued by any court, judge, magistrate, or other person whomsoever," must be recognized as constitutional by every State court; that is, assumed that the officers were *judicial* and were "acting within the jurisdiction," which might, under the Constitution, be committed to them. The original warrant for the arrest of a negro as a fugitive from labor, which occasioned the conflict of jurisdiction in this case, had been issued out of the circuit court.

Judge Nelson, in his charge to a grand jury, in the city of New York, April, 1851. Blatchford's C. C. R. p. 641, denies that the State courts may issue the writ to inquire into the legality of the detention under color of this law, either on the ground that such detention is not warranted by the statute, or that the statute is unconstitutional; saying, "it is obvious that the existence of either power on the part of the State tribunals would be fatal to the authority of the Constitution, laws, and treaties of the general government." referring to *U. S. v. Peters*, (*Olmstead's case*), 5 Cranch, 115.

The question whether the State courts have this power of concurrently inquiring into the cause of detention, is distinct from that of the power of the States to determine on the claim of the owner exclusively of any authority exercised under laws of Congress. The State laws and judicial decisions which are based on such a view of the public law of the United States are to be noticed in another place.

<sup>1</sup> *Houston v. Moore*, 5 Wheaton, p. 24; *Curtis' Comm.* p. 171-175.

<sup>2</sup> This delicate question has been the subject of much juristical discussion. It is not easy to marshal the authorities. In favor of such concurrent judicial power seem



of the State, who, under those laws, have acquired rights or incurred obligations.

That exercise of judicial power, by the tribunals of any one nation applying laws in a forum wherein those laws have no proper territorial extent, was derived from the presumption that such laws are jural, and, therefore, presumptively identified with the juridical will of the supreme power in the forum, from whose appointment those tribunals derive their existence. But in laying a foundation for the exercise of judicial power by a State tribunal, in support of rights and obligations arising under the national municipal law, including the legislation of Congress, there is an additional reason for a recognition, on the part of the State tribunals, of the jural character of that legislation. This is, that it is based upon the Constitution, to which the people of each State is a consenting or constituent party, and that the laws or rules of action comprehended in the national municipal law have territorial and personal extent within the forum of State jurisdiction, independently of the principle of comity, as it has herein before been set forth.

§ 452. This idea appears to be the foundation of the opinion of Judge Platt, dissenting from the other judges of the Supreme Court of New York, in *United States v. Lathrop*, 17 Johnson, pp. 11-22 ; in which he refers to a passage in No. 82 of the *Federalist*, by Hamilton, in which these principles of a universal jurisprudence and private international law are recognized ; “ I am even of opinion that in every case in which they [the State courts] were not expressly excluded by the future acts of the national legislature, they will, of course, take cognizance of the

to be, the majority of the court in *Houston v. Moore*, 5 Wheaton, 1 ; *Federalist*, No. 82 ; 1 Kent, 398-400 ; Rawle on Const. ch. xx, note ; Judge Platt, dissenting, in *U. S. v. Lathrop*, 1 Johns. R. 5 ; *Buckwalter v. U. S.*, 11 Serg. and Rawle, 196. Against the exercise of such power, Story and Johnson, Justices, dissenting, in *Houston v. Moore*, 5 Wheaton, 32, 47 ; Story Comm. § 1751 ; Story J., in *Martin v. Hunter*, 1 Wheaton, 337 ; *Commonw. v. Feely*, Virginia Cases, 321 ; *Ely v. Peck*, 7 Conn. R. 239 ; *U. S. v. Campbell*, 6 Hall's Law Journ. 113, *U. S. v. Lathrop*, 17 Johns. 5, 7, a suit for penalty under act of Congress conferring jurisdiction on State court. In *U. S. v. Dodge*, 14 Johnson, on the bond of a U. S. collector, where jurisdiction was given by an act of Congress to State courts, the suit was sustained.

See comparison of authorities in Sergeant's Const. Law. ch. 27 ; Rawle on Const. ch. 20, 24 ; 1 Kent's Comm. 395-404, Lect. 18 ; Curtis' Comm. §§ 134-144.

causes to which those acts may give birth. This I infer from the nature of judiciary power and from the general genius of the system, [i. e., American Constitution.] The judiciary power of every government looks beyond its own local or municipal law, and in civil cases, lays hold of all subjects of litigation between parties within the jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts. When in addition to this we consider the State governments and the national Government, as they truly are, in the light of kindred systems and as parts of *one whole*, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited."<sup>1</sup>

§ 453. The general principles from which a concurrent jurisdiction in the State courts, it is here supposed, may be derived, would appear to support that jurisdiction over persons or things within the territorial limits of the State forum, in all cases. But it seems to be generally admitted that the concurrent judicial power is, at least, applicable where the action and relations affected by the national law are such as "originally" or "previous to the Constitution" were within the jurisdiction of the State; that is, its legislative or juridical power, including the judicial power of its courts.<sup>2</sup>

§ 454. It has generally been admitted that not every grant

<sup>1</sup> And see Story's Comm. §§ 1751-1753; Duponceau on Jurisd. p. 26.

<sup>2</sup> *Ante*, § 447; 1 Kent's Comm. 397; Curtis' Comm. §§ 119-122; Story's Comm. § 1751, and in *Martin v. Hunter*, 1 Wheaton, 837; "and it can only be in those cases, where, previous to the Constitution, State tribunals possessed jurisdiction independent of national authority that they can now constitutionally exercise a concurrent jurisdiction." Federalist, No. 82, "But this doctrine of concurrent jurisdiction is only clearly applicable to those descriptions of causes of which the State courts have previous cognizance. It is not equally evident in relation to cases which may grow out of, and be *peculiar* to, the Constitution to be established; for not to allow the State courts a right of jurisdiction in such cases, can hardly be considered as the abridgment of a pre-existing authority," cited in Story's Comm. § 1752. In another sentence of the same number of the Federalist the expression is used, "the State courts will retain the jurisdiction they now have unless," &c.

Most of the opinions which are against the exercise of the State power in enforcing the penal law of the U. S., (*ante*, p. 497, note,) may have been based on this distinction. Compare Curtis' Comm. § 187.

of power to Congress to legislate, in reference to certain objects, requires the inference that such power is either exclusive or may at any time be made so by Congress.<sup>1</sup> In some of the cases, while it was admitted that there might be a legislative power in the States in reference to many subjects which the Constitution places within the reach of the national organ of legislation, it has been further held that the actual legislation of Congress precluded the operation of all legislative action on the part of the States in reference to the same subject matter.<sup>2</sup> The doctrine, pushed to this extent, has always been very generally disputed. If taken literally or strictly, there can be no such thing as concurrent legislation, even if it can be said that there is such a thing as concurrent legislative power.

But whatever may be the true doctrine as to the concurrent legislative power, the principles which would restrict it would not have equal force in limiting the concurrent exercise of judicial power in applying rules which, having derived their existence from, or having originated in the national branch of powers and not in the State's powers, may still be assumed by the State's tribunals to be identified with the juridical<sup>3</sup> will of the State.

§ 455. If the States, in their possession of sovereign powers, can hold the judicial function, in any degree, with reference to the national municipal law, yet, on the other hand, in considering whether their courts shall exercise it, it must be supposed, (since there is no provision in the Constitution of the United States respecting the exercise of the judicial function of the States,) that the States may confine the jurisdiction of tribunals created by themselves within any limits they may see fit. They

<sup>1</sup> 1 Kent, 388; *Houston v. Moore*, 5 Wheaton, 49.

<sup>2</sup> 1 Kent's Comm. 391; Story's Comm. §§ 441-447; *Sturges v. Crowninshield*, 4 Wheaton, 193; *Steamboat Co. v. Livingston*, 8 Cowen, 714, 716; *Jack v. Martin*, 12 Wendell, 317, 318, 320; *Prigg v. Pennsylvania*, 16 Peters, 542, against concurrent legislative power in the States relative to the execution of the constitutional provision for the delivery of fugitive slaves, held by Justices Story, Baldwin, Wayne, and McLean. Taney, C. J., and Justices Thompson and Daniel, dissenting.

<sup>3</sup> The use of *juridical*, as a more comprehensive term than *legislative*, must be admitted in explaining how the judicial power of the States may be exercised in reference to action and relations determined by the national branch of powers, and in respect to which the State cannot, or has not exercised its legislative power concurrently.

might then allow their judicial officers to administer only that law which rests upon State authority solely, or restrict them from exercising jurisdiction in applying any part of the national law or some specific parts of that law :<sup>1</sup> though the State courts would still, in any case, as was above said, be obliged to apply the national law so far as it may be public law or the evidence of political powers and obligations.

§ 456. But if the above argument derived from principle is correct, the State courts will, unless expressly prohibited by the State, have jurisdiction to apply the national law when that law affects persons and things, within their forum of jurisdiction, in reference to circumstances (action and relations) which would be within the State's legislative or juridical power, "before the Constitution," or, if the present national or federative organization did not exist ; provided the State courts are such as hold, or are invested with, the ordinary or general judicial power of the State, or are tribunals "proceeding according to the course of common law ;" or, negatively, are not courts of limited or

<sup>1</sup> Sergeant's Const. Law, 1st ed. p. 274 ; Story's Comm. § 1755 ; 1 Kent's Comm. pp. 400-404, p. 402. "The doctrine seems to be admitted that Congress cannot compel a State court to entertain jurisdiction in any case ;" noting Dewey, J., Mass. Supreme C., Law Reporter, April, 1846, Ward v. Jenkins ; "The doctrine now is, that Congress cannot compel a State court to take any jurisdiction. But where the State court has jurisdiction otherwise, it is no objection to its executing it that the rights arise under a statute of the United States."

Story, J., in Prigg v. Commonw. of Pennsylvania, 16 Peters, 614, "since every State is perfectly competent and has the exclusive right to prescribe the remedies in its own judicial tribunals, to limit the time as well as the mode of redress, and to deny jurisdiction over all cases which its own policy and its own institutions either prohibit or discountenance." Mr. Justice McLean, in the same case, p. 665, assuming that the Governors of the States, in delivering up fugitives from justice, when demanded by other States, in the manner prescribed by the act of Congress relating to such persons, derive their power to do so from the U. S. and not from the State, says, "Now, if Congress may by legislation require this duty to be performed by the highest State officer, may they not, on the same principle, require appropriate duties in regard to the surrender of fugitives from labor, by other State officers ? Over these subjects the constitutional power is the same." The term, "appropriate duties," is apparently used in the sense of duties appropriate to the functions held by the State officers ; and since, on pp. 667, 669, Judge McLean speaks of the State officers to whom he refers as being "judicial officers," it would seem to be his opinion either that persons clothed with the judicial function of the State were bound to exercise it, to carry out a law of Congress when required by the national legislature, or else that by some principle of public law such persons were bound to accept the judicial function derived from the United States. Taney, C. J., said in same case, p. 630, "The State officers mentioned in the law are not bound to execute the duties imposed upon them by Congress, unless they choose to do so, or are required by a law of the State ; and the State legislature has the power, if it thinks proper, to prohibit them."

special jurisdiction, not proceeding according to the course of common law.<sup>1</sup>

§ 457. In such case it may not only be within the *power*, but also be within the *duty* of the State courts to apply the national law, whether found in the Constitution taking effect as private law, or derived from the legislative powers of Congress.<sup>2</sup>

<sup>1</sup> *Jurisdiction* is here called general or ordinary in reference to the possession of the judicial function for the enforcement of the entire body of rules whose authority rests on the juridical will of the sovereign power,—the law of the land, the municipal law. Some courts having such general or ordinary jurisdiction may still be limited or inferior courts, in reference to the fact of their holding this function in and for a limited forum or geographical jurisdiction, a subdivision of the entire territorial dominion of the sovereignty, whose law they apply, and in reference to the existence of higher courts to which an appeal may be made from their judgments. For a distinction of such courts, see *Kempe's lessee v. Kennedy*, 5 Cranch, 185; *Murray v. Fitzpatrick*, 17 Wendell, 488, and cases there cited. That, in relying on a judicial decision, the jurisdiction of this class of courts is presumed, while that of courts of special jurisdiction must be traced back to some enabling act of the sovereign, see *Jones v. Reed*, 1 Johns. Cases, 20, and 1 Caines' R. 594, note. *Wells v. Newkirk*, 1 Johns. Cases, 228; *Bloom v. Burdick*, 1 Hill, 139. And compare *Clinton, Senator*, in *Yates v. Lansing*, 9 Johnson R. 431-437.

<sup>2</sup> 1 Kent's Comm. 397-400; *Ward v. Mann*, Supr. Court of Mass.; Law Reporter, March, 1847.

By the act of Congress, of 12 Feb. 1793, § 8, the judges of the U. S. Circuit and District Courts and certain persons therein described as "any magistrate of a county, city, or town corporate," are authorized to perform certain acts in reference to persons claimed as fugitives from labor. In *Prigg's case*, 16 Peters', 539, the question decided was of the validity of a statute of Pennsylvania affecting persons to whom that law of Congress applied; and, as preliminary to the question of the force of the State law, the question of the power of Congress and the constitutionality of the law of 1793 was examined. To this extent, of recognizing the power of Congress and its having been exercised in such a manner as to exclude the operation of State legislation, (*ante*, § 452,) the constitutionality of the law of 1793 was affirmed. Under the circumstances of that case, no right, power, or authority derived from any such "State magistrate" was claimed for or relied upon by any of the parties. The only members of the court who, in their several opinions, refer to the action of "State magistrates" under the act were Mr. Justice Story, delivering the Opinion of the Court, p. 622, and saying, that the constitutionality of the act, in its leading provisions, was free from reasonable doubt or difficulty "with the exception of the part which confers authority on State magistrates," but that no doubt was entertained that they might, if they chose, exercise that authority, unless prohibited by State legislation; Chief Justice Taney, p. 630, saying, "The State officers mentioned are not bound to execute the duties imposed upon them by Congress, unless they choose to do so, or are required to do so by the law of the State; and the State legislature has the power, if it thinks proper, to prohibit them;" and Mr. Justice McLean, p. 664, 665, who, alone, held that the duty might be imposed on the State officers by Congress.

But it would appear, from every thing said by the Justices on this point, that they held that, whatever power should be exercised by the State officers in the supposed cases, would be the concurrent *judicial* power of the State.

The author may reasonably hesitate in making this assertion, in view of the opinion of the Supreme Court of Massachusetts, pronounced by Chief Justice Shaw, in *Sims' case*, 7 Cushing, 285, who, after noticing, p. 302, that it had in that case been "insisted that the Commissioner, before whom the petitioner [the fugitive] had been brought, is in the exercise of judicial powers not warranted by the Constitution because not commis-

§ 458. This concurrent judicial power in the State courts would, it will be noticed, be limited, even while applying a rule of the national municipal law, by the same political conditions which limit their judicial function in the application of local law. It will be operative only within the limits of the State, whether the law applied is derived from the juridical authority of the United States or from that of the State. It is the judicial function of the United States only, which is equally authoritative in all parts of the dominion of the people of the United States,<sup>1</sup> and that this function cannot be exercised by the State court is a proposition directly deducible from the Constitution, and there is no judicial decision which attempts to support a contrary doctrine.<sup>2</sup>

From these necessary limitations of the extent of State judicial power, the rule of action which they thus concurrently apply will, although the same, in its origin and in its purpose

sioned as a judge, nor holding his office during good behavior," argued that Congress, in the act of 1793, manifestly did not deem that the action of the State magistrates would be judicial in the premises; and, in referring to the cases arising under that law as sustaining this doctrine, cited the above opinion of the Supreme Court of the U. S. as most conclusive, adding, p. 308, "In the only particular in which the constitutionality of the law of Congress, of Sept. 1850, is now called in question, that of 1793 was obnoxious to the same objections, that of authorizing a summary proceeding before officers and magistrates not qualified under the Constitution to exercise the judicial power of the general Government."

The same view of the point decided in Prigg's case seems to have been adopted by Judge Nelson, in his charge to the grand jury, Blatchford's Cir. C. R. 643; alluding to the objected unconstitutionality of the law of 1850 in its grant of powers to the U. S. Commissioners; "It is sufficient answer to this suggestion that the same power was conferred upon State magistrates by the act of 1793, and which, in the case of Prigg, was held to be constitutional by the only tribunal competent under the Constitution to decide that question. No doubt was entertained by any of the judges in that case that these magistrates had power to act, if not forbidden by the State authorities."

It seems to have been assumed, by these authorities, that the court in Prigg's case intended to sanction the application of the law of 1793, by some persons who could neither hold the judicial power of the U. S., (*post*, § 460,) nor exercise the *concurrent judicial* power of a State, (*ante*, § 456.) It will, in a later portion of this work, be urged that this *assumption* is unwarrantable: 1st, because it is, at least, doubtful whether the action of any such person under that law was involved in any of the earlier cases which were approved by the court in Prigg's case, (16 Peters', 621,) and the court does not otherwise define the "State magistrates," whose action it sanctions; and, 2d, because the court in that case speaks of such action only as an exercise of *judicial* power.

<sup>1</sup> *Ante*, §§ 375, 379.

<sup>2</sup> But Judge Crawford, of the Supreme Court of Wisconsin, in the matter of Booth, 8 Wisconsin R. p. 81, 82, dissenting from the majority of the court in respect to the constitutionality of the law of 1850, seems to have held that, in maintaining the action of State magistrates under the law of 1793, and of U. S. Commissioners under that of 1850, the doctrine is involved, that they may constitutionally exercise judicial power derived from the United States.



or direct effect on private persons, as that applied by the national judiciary, be essentially local in its authority and territorial jurisdiction, and equivalent to a law derived from a different political source, that is, to a local municipal law. This will certainly be so if, on the authorities, this concurrent application of a national law by the State's judicial power is to be limited to cases where the action and relations affected are such as were "originally" within the juridical power of the State, or such as may be within the concurrent legislative (juridical) power of the State, according to the standard already stated in considering the extent of that power.

§ 459. Though it should be admitted that a rule in reference to certain action and relations is supported both by the juridical authority of a State and that of the United States, and, therefore, as above held, may be applied by the judicial power emanating from either; yet, since it is supposed that the Constitution assigns the power over such action and relations to the national Government, the judicial power of the State in this case of its concurrent exercise must be subject to that of the United States.

The judgment of the State court, applying the national law in reference to such action, must always be subject to the national judiciary,<sup>1</sup> and if the law involved criminal punishment, the sentence of the State court might properly, it would seem, be annulled by the pardoning power of the national executive.<sup>2</sup> In this instance the national judiciary would control the State judiciary in the application of private law: not, as in the instance before mentioned, (§ 448,) control the juridical action of the State by applying the Constitution as public law.

§ 460. With the consent of the State, from which they derive their existence and legal personality, and subject to the control of the judicial power vested in the national Government, the State

<sup>1</sup> *Martin v. Hunter*, 1 Wheaton, 337, 352; *Federalist*, No. 82; 1 Kent's Comm. 820, 896, 397; Const. Art. III. sec. 2, 1. "The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority."

<sup>2</sup> See the difficulties suggested as to concurrent criminal jurisdiction, 1 Kent's Comm. 404; *Mattison v. the State*, 8 Missouri R. 301.



courts might, it would appear, be invested with the judicial *power of the United States* in reference to persons and things within the limits of their State jurisdictions and be considered inferior courts, such as are mentioned in the first section of the third Article of the Constitution ; if the tenure of office by the judges of all courts holding the judicial power of the United States were not so prescribed as to be inconsistent with its investiture in persons known or described as representatives of State powers.<sup>1</sup> A person holding the judicial power of a State might, apparently, be also appointed, in the manner prescribed in the Constitution, a judge of one of those courts in which the judicial power of the United States is to be invested ; in which case there would be two separate tribunals represented in his person. But if the judicial power of the United States should be conferred on a person only in virtue of his official character derived from the State, or as being a State officer, his tenure of that judicial power would be dependent on the will of the State. Therefore, State judicial officers or magistrates cannot, as such, or in their public capacity, hold the judicial power of the United States to apply the national municipal law.<sup>2</sup>

§ 461. According to the first section of the third Article, the judicial power of the United States, whatever that may be, is to be invested “in one Supreme Court and in such inferior courts as Congress may ordain and establish.” Judges of the Supreme Court must, according to the second section of the second Article, be appointed by the President and Senate. By

<sup>1</sup> Art. III. sect. 1. “The judicial power of the United States shall be vested in one supreme court and in such inferior courts as the Congress may from time to time ordain and establish. The judges both of the supreme and inferior courts shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.” Art. II. sect. 2, (of the powers of the President) parag. 2. “He shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, judges of the supreme court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may, by law, vest the appointment, of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments.”

<sup>2</sup> *Martin v. Hunter*, 1 Wheaton, 330. Story J. “Congress cannot vest any portion of the judicial power of the United States except in courts ordained and established by itself.” Story’s Comm. § 1755 ; 1 Kent’s Comm. 399 ; case of Almeida, from 12 Niles’ W. R. 115, 213 ; Pool and others, from Nat. Intelligencer, Nov. 10, and Dec. 11, 1821, cited in Sergeant’s Constitutional Law, 1st ed. 274.

the various acts relative to the national judiciary the judges of the Supreme Court are severally the judges of the different Circuit Courts, the highest of the courts inferior to the Supreme Court. The Circuit Courts and the Supreme Court being distinct in their jurisdiction, although the same persons are judges in each.<sup>1</sup> The judges of the District Courts have been appointed in like manner by the President and Senate ; though, according to the language of the second section of the second Article, they might be otherwise appointed. The judges of these courts are understood to hold office according to the terms of the first section of the third Article,—“ The judges both of the supreme and inferior courts shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.”<sup>2</sup>

§ 462. If the judicial power of a state is exercised only when its laws are applied by persons having the name of *judge* or *judicial* officer, performing their duties with that style and manner which includes times, terms, and places of action publicly determined, with a permanent record by subordinate officers of that application in its details, accessible to public inspection, it may be said that the judicial power of the United States has been vested by Congress only in courts whose judges hold their office according to the constitutional requirements. But if the nature of the judicial power is independent of the name or title of the official person exercising it, the times and places in which it is exercised, and the degree of solemnity with which it is surrounded, there is a question of the comparative extent of that power which, in the Constitution, is called the *judicial* power of the United States. Or, in other words, it being supposed that there is an administrative or ministerial application of the national municipal law, as well as a judicial one, the inquiry must be made, how far the administration of the national municipal law can be intrusted to persons who are not judges of courts, holding office with the constitutional qualification.

<sup>1</sup> Brightly's Digest, p. 124-126.

See note on the opposite page.

This inquiry is distinct from that question of the application, by State judicial officers, of the national municipal law which has already been considered.

§ 463. In every state wherein the three functions of sovereignty are divided or separately invested, those who exercise the executive and legislative functions have a power of applying the existing law as a coercive rule for private persons ; though it is herein supposed that, in a state wherein this division of functions has a constitutional character and the Government exists under law, the limits of the power so exercised must be subordinate to the review of those who hold the judicial function.<sup>1</sup>

In every state wherein the administration of justice is distinguished from the arbitrary exercise of political power,<sup>2</sup> the exercise of the judicial function by courts or judges has required the concurrence of officers holding a kind of power which, according to the use of terms among such states, is rather administrative or ministerial in its nature than judicial ; though auxiliary or ancillary to the exercise of judicial power by others. Those who, under the Government of the United States, exercise a discretion thus ancillary to that of the courts, or of the judges holding the judicial power of the United States, may, undoubtedly, hold their office otherwise than in the manner prescribed for those judges, without any violation of the Constitution. Since, wherever law is applied under political authority to determine the action of private persons, there is a greater or less exercise of judgment on the part of some one invested with public authority, it is not always easy to distinguish the administrative from the judicial power, or this latter from that ancillary ministerial power which is connected with it. It is a question of public law, and the line of separation will be differently placed in states having different political constitutions.<sup>3</sup> The rule of discrimination under the American Constitution must be found in the usages of states wherein the functions of

<sup>1</sup> *Ante*, 437. But see *lessee of Livingston v. Moore*, 7 Peters, 546-549, and p. 668. in Appendix ; 2 Brockenborough's R. 479, 480.

<sup>2</sup> *Ante*, § 363.

<sup>3</sup> On this subject see Bowyer's Universal Public Law, ch. xxv.

sovereignty are divided, and especially in the antecedent usages of England, where they have the character of common law.

§ 464. An ordinary definition of the term *judicial*, is given by connecting it with the existence of some judge or court ; a *judicial act* is said to be one exercised or performed by a judge or court. But the question here being whether the act to be performed under the authority of the United States is that judicial power of the United States which may be vested only in a court whose judges hold office in accordance with the constitutional requirement, the term *judicial* must be defined without reference to the public character or quality of the person performing the act : for his capacity is to be determined by the intrinsic nature of the act, not the nature of the act by the quality of the person.<sup>1</sup> A judicial act must, from the nature of law, be one in which the coercive authority of the law is made manifest—not in the original creation of rights and obligations between private persons, but in giving them real force by ancillary rights or legal remedies. It is an act of judgment or decision having reference to the elements of *jurisdiction*—a coercive superior, and a certain geographical territory and its inhabitants.<sup>2</sup> Not every act done by a public officer in reference to the existence of a law is a judicial act, or judgment ; otherwise the whole mechanism of a republican or constitutional Government<sup>3</sup> might be called judicial. In interpreting the Constitution, as before shown, the previous juridical use of words by the possessors of sovereign power who established the Constitution must be referred to ; and, as used by them in the technical language of English common law, a judgment or judicial act not only implies a law and persons to be affected by it, but a suspension or determination of that ordinary choice of action which those persons might have had in relation to it,<sup>4</sup> and a coercive performance or allowance, in reference to some limited territorial

<sup>1</sup> 3 Bl. Comm. 23. “A court is defined to be a place where justice is judicially administered :” noting Co. Litt. 58. Here the meaning of *judicially* must be ascertained as preliminary to that of *court* or *judge*.

<sup>2</sup> *Ante*, § 26.

<sup>3</sup> *Ante*, §§ 357–364.

<sup>4</sup> That is, to exercise the natural power of choice and action before the law has been applied as a coercive rule, *ante*, § 2.

jurisdiction, of that action the right to which had been controverted ; so that the relation in which that right is a constituent part is actually established in and for a certain forum or jurisdiction ; this determination, decision, or judgment being thereafter supported by the power of the state, as its expressed will in reference to the persons and things involved in that relation.

§ 465. In the judiciary department of the Government of the United States a number of officers are included whose duties are not judicial, though they involve the application of law to a certain condition of persons and things. Such, without question, is the action of the clerks of the courts, and of the United States Commissioners and State justices of the peace, under the earlier statutes defining their powers.<sup>1</sup> Their office is ministerial, and subordinate to the duties of the judges of the several courts. In the exercise of their ordinary power they do not determine or enforce a legal relation, with its rights and obligations, in reference to a definite jurisdiction, as above described ; but only certain temporary relations or remedial rights, ancillary to the action of the judges of the courts in their exercise of judicial power.<sup>2</sup>

§ 466. This interpretation of the term *judicial power*, in the Constitution, must also be made with reference to distinctions in the nature of laws resting on the authority of the United States. For as there are ministerial or executive officers in every state, altogether distinct from its judiciary, there is a

<sup>1</sup> For the various Acts respecting their powers and duties, see titles *Commissioners* and *Justices of the Peace*, in Brightly's Digest.

The opinion prevails with the public and the legal profession that the action of the U. S. Commissioners in executing the provisions of the fugitive slave law of 1850, has been determined not to be an exercise of the *judicial* power of the U. S., by an overwhelming weight of *judicial decision*. The question whether such action is or is not an exercise of the judicial function, is to be considered in a later portion of this treatise. But it may here be observed with reference to the existence of judicial opinion supporting the negative, (and without questioning the existence of judicial authority affirming the constitutionality of that statute in other respects,) that it appears to rest, almost entirely, upon the correctness of that view of the opinion of the Supreme Court, in Prigg's case, as to the power of State magistrates under the law of 1793, which was taken by Chief Justice Shaw and Mr. Justice Nelson, as has been already noted. *Ante*, p. 501, note.

<sup>2</sup> See the older cases of Almeida and Rhodes, in 12 Niles' Weekly Register: *ex parte* Poole, &c., Nat. Intell. Nov. 10, Dec. 11, 1821, cited in Sergeant's Const. Law, 1st ed. p. 274

particular personal law for the regulation of such ministerial instruments of the state ; the administration of which is distinct from that of the ordinary territorial law. Thus there is a rule of action for those by whom the ordinary operation and administration of the Government is continuously maintained.<sup>1</sup> And it appears that the power of pronouncing judgment under the military and naval laws of the United States is not that judicial power of the United States which is referred to in the third Article of the Constitution. For although judicial in its nature, and performed under the authority of the United States, it has been by the constant usage of all nations exceptional to the civil administration of justice ; though, in England and America, subordinate to it where the rights of persons under *civil* laws, as distinguished from military, are concerned.<sup>2</sup>

§ 467. So there is an important class of legal relations (i. e., relations composed of legal rights and obligations) which arise out of that international law which has more of the character of public than of private law, and which, as such, may be distinguished from the ordinary positive or municipal law. From the *exterior* character of this law, that is, from the fact that it must operate in places not included within the territorial forum of ordinary judicial tribunals, the rights and obligations incident to these relations must be coercively maintained by the executive or administrative function of the Government, acting independently of the judicial function, in a greater or less degree ; a degree determined partly by the general rules observed by civilized states in reference to such objects of human interest and action as cannot, from their nature, be distinctly divided among and included under the limits of different states,<sup>3</sup> and partly by national customary law derived from the action of the predecessors of the existing Government in similar circumstances ; each

<sup>1</sup> In the French, *Droit gouvernemental*; German, *Regierungs Recht*, including police law and the laws of financial economy, *Droit financier, cameral und Finanzrecht, jus cameral*; see Falck's *Juristische Encycl.* §§ 41-44. And, in popular or republican governments, those rules by which the existence, continuance, and action of legislative bodies are determined. See Cushing's *Law of Legislative Assemblies*, Introduction.

<sup>2</sup> See 1 Kent's *Comm.* 341, note ; U. S. v. Mackenzie, Judge Betts' decision, U. S. District Court, in 1 New York Legal Observer, 371.

<sup>3</sup> *Ante*, § 10.

nation having in this respect a peculiar law,<sup>1</sup> a *jus proprium*, differing more or less from that of other nations, according to the greater or less degree in which it may be historically connected with them, or in which it may have with them a community of origin and language, and a political affinity.<sup>2</sup>

<sup>1</sup> Though always supposed to conform to a general law prevailing among all nations, public international law, the "law of nations" in that sense; and by English and American jurists it is rarely distinguished by any other name. Compare *ante*, p. 88, note. By the French writers it is designated *droit gouvernemental extérieur*; by the Germans, *äusseres Regierungerecht*, or *äusseres Staatsrecht*; Falck's Jurist. Ency. §§ 45, 135.

<sup>2</sup> Thus, whether an administrative Government (not identical with the ultimate possessor of sovereign power) may or may not at its discretion deliver, to the custody of foreign states, persons who are demanded as obnoxious to the punitive law of such states; or, if it may so surrender such persons, whether the act requires the co-operation of two or more of the three functions of power, when separately invested, are questions not determinable by public international law alone, simply as a general rule among nations, but depend very much on the internal public law of the state and of its form of government; which, therefore, must always be taken into account in the application of an international treaty for such extradition or rendition.

Falck's Jurist. Encycl. § 135, Fr. ed. "On distingue avec raison, du droit des gens positif de chaque état particulier, le droit des gens positif universel, attendu qu'on peut apercevoir, au moins entre les peuples qui entretiennent ensemble beaucoup de relations, un accord sur les règles de droit positif aux-quelles ils conforment leurs actions et d'après lesquelles ils veulent qu'elles soient jugées."



## CHAPTER XVI.

THE LOCAL MUNICIPAL LAWS OF THE UNITED STATES, AFFECTING CONDITIONS OF FREEDOM AND ITS CONTRARIES, CONSIDERED IN CONNECTION WITH PRINCIPLES OF PUBLIC AND PRIVATE LAW WHICH HAVE BEEN STATED IN PREVIOUS CHAPTERS.

§ 468. Reference has already been made, in the eleventh chapter,<sup>1</sup> to the fact that at the date of the Revolution the geographical limits of the original colonies were not definitively settled. The present limits of the older thirteen States and of the States Kentucky, Vermont, and Maine, were determined by various agreements between the States, to which it is not necessary to refer more particularly, and by the cession or grant of portions of the territory claimed by them, or by some of them, to the Confederation or to the United States in their national or federal capacity. These older States will herein be taken to have had their present boundaries from the period of the separation of the colonies from the British empire. The effect of the different cessions of territory made by some of those States to the United States, in determining the existence of local laws in and for certain limits, will be considered in the history of the laws of the Territorial jurisdictions and new States afterwards formed in the territory ceded.

§ 469. It has already been shown that the people, who (under the name of “the people of the United States” in the preamble to the Constitution) appear as the constituting and delegating

person, and the people who, in the tenth Article of the Amendments, are declared to be, in the alternative with the States, the possessor, by reservation, of the powers not granted to the national Government, are of necessity to be recognized as already existing in the form, organization, and political personality of the people of "several States," although having, antecedently to the Constitution, a national organization and integral political personality. The existence of the political people of each several State is, therefore, not a result of the Constitution, (as of a law in the primary sense,) but only a fact proved or asserted by it, (as by a law in the secondary meaning of the term.)<sup>1</sup> And, in accordance with the view which is herein before taken of the nature of the Constitution of the United States and of the meaning of the term *law* when spoken of as determining the actual investiture of sovereignty, the supreme and independent powers which, according to that Constitution, are vested in the several States or the several political people of those States are not taken to be held by such States or people under a law in the strict sense contained in the Constitution; but that *possession* must be considered antecedent to law, in the sense of a rule, and co-ordinate with the possession of other sovereign powers by the same States, or the people of the same States, united. The Constitution, in determining this relation also, being a law in the secondary sense only, the statement or evidence of an existing fact. Though in reference to persons who are the instruments or the subjects of that power, it has the effect of law in the primary sense, or of a rule of action.

§ 470. As, therefore, the possession by the united people of those powers which in the Constitution are granted to the national Government is a fact underlying the national municipal law, it is in like manner the first or basal principle of the local law of each of the several States of the Union that the people thereof, as a political personality, pre-existent to the State Government or the organized instrument of that sovereignty, are the actual continuing and original possessors of that separate share of sovereignty spoken of in the Constitution of the United

<sup>1</sup> *Ante*, §§ 330-346.

States as being “reserved to the States or to the people.” As the political *existence* of the people of each State is not caused by the Constitution of the United States, neither is the *possession* of those powers by that people an effect of the same; neither fact being established by it for the future; unless the guarantee for a republican government<sup>1</sup> has the effect of securing such a popular or public (*national*), as opposed to private,<sup>2</sup> investiture of the political sovereignty to be exercised severally in such State over persons and things therein.

§ 471. Although the fact of the possession of this share of powers by the several people of one of the States is thus a fact antecedent to the recognition of the positive law of that State, its local municipal<sup>3</sup> law, yet the mode in which individual inhabitants are to participate in that sovereignty and be individual members of the political people, (which is political liberty considered as the right of private persons, according to previous definition,<sup>4</sup>) is the consequence of a rule of action made positive law<sup>5</sup> by the will of that political integer, the political people of the State. Which law is private law, in respect to its effect upon natural persons, though public law in its relation to the existence of the State.

§ 472. In each State of the Union, on the assumption of political sovereignty by the confederated colonies in the Revolution, the laws determining the actual constitution or composition of the political people of the colony continued, by the very fact of the assumption of independent supreme power by the people of the United States, and were established in the successful maintenance of that assumption.<sup>6</sup>

<sup>1</sup> *Ante*, § 424.

<sup>2</sup> *Ante*, § 354 and note.

<sup>3</sup> *Municipal* law of the State, meaning that law which is both internal and international in personal extent, and which, in its *kind*, is more properly called *national*, as derived from the exercise of independent sovereign power such as belongs to states or nations, *ante*, § 9. But, to avoid confounding it with that law which is herein called national from its origin in the will of the United States as an integral nation or state, the word *municipal* is here used for the *State* law. Compare *ante*, p. 222, note.

<sup>4</sup> *Ante*, § 352.

<sup>5</sup> *Ante*, §§ 335–346. The people of the U. S. are primarily known as the people of the several States (*ante*, § 343). If, therefore, the doctrine of the social compact has ever been realized in the political history of this country, it must have been in the existence of some several State or States. But neither the history of the States nor that of the Union exhibits any illustration of the compact which might not, with equal

§ 473. The law of political rights, or of the political liberty of private persons, is the fundamental law of any state wherein sovereignty is a public or popular (national) right, as contrasted with private right, and the essential fact of its constitution, whether written or unwritten.<sup>1</sup> In the several States of the Union this law, of the possession of political liberty by private persons, has been determined by the same acts by which Governments, distinct from and subordinate to the political people of such State, have been founded, formed, or constituted. And, from the mode of existence of that "people of the United States," which established the national Constitution, the possession of political liberty by private persons is, in reference to the sovereign powers which are, in each State, held by that people with national extent or for the purposes of their national (federal) existence, determined by the same acts. In other words, the laws, which in the several States determine the individuals composing the political people of each State, determine also the composition of the political people of the United States acting as one, or so far as they are one people or integral body.

§ 474. In all the existing States of the American Union the political people of each have founded Governments for the administration of their share of sovereign powers, delegating to those Governments, with limitations, the powers of the State or

propriety, be called a usurpation (*ante*, p. 120, note 2). Using the metaphysical distinction between an idea of the reason and a conception of the understanding, it may be said: "Reflect on an original social contract, as an event or historical fact, and its gross improbability, not to say impossibility, will stare you in the face. But an ever originating social contract as an idea, which exists and works continually and efficaciously in the moral being of every free citizen, though in the greater number unconsciously, or with a dim and confused consciousness, — what a power it is!" Coleridge's *Literary Remains*, vol. iii. p. 84, in note to the following from Hooker's *Ecclesiastical Polity*, c. x. 8, p. 308: "Of this point, therefore, we are to note, that sith men naturally have no free and perfect power to command whole politic multitudes of men, therefore utterly without our consent we could in such sort be at no man's commandment living. And to be commanded we do consent, when that society whereof we are part, hath at any time before consented, without revoking the same after by the like universal agreement. Wherefore, as any man's deed past is good as long as himself continueth, so the act of a public society of men done five hundred years sithence standeth as theirs who presently are of the same societies, because corporations are immortal; we were then alive in our predecessors, and they in their successors do live still. Laws therefore human, of what kind soever, are available by consent." And see Coleridge *On the Constitution of the Church and State according to the Idea of each*, ch. i.

<sup>1</sup> *Ante*, §. 355.

people ; the limitation of the power of the Government being made in written Constitutions, both by absolute reservations of power and by prescribing forms, in which only the powers granted shall be exercised. The Constitutions of the several States, like that of the United States, are evidence of the fact that the people of those States hold the supreme power, and have the same character of public and private law (in the primary sense of a rule) determining the political liberties of private persons, because they have rights secured to them thereby as individual members of the integral body-politic.<sup>1</sup>

§ 475. The modal existence of the sovereignty of a state and the form of its instrumental government being, essentially, its constitution, and these State Governments being founded on the political rights of individuals, who, as natural persons, are also subject to the Government of the State, these Governments are *republican*, according to the definition before given.<sup>2</sup> Although the meaning of the term in the Constitution of the United States has never been judicially determined, yet, since no appeal has hitherto been made to the Government of the United States, under that guarantee, from any quarter,<sup>3</sup> it is to be presumed that all the State Governments have a republican form.

§ 476. There being then in all the States a law, proceeding from the ultimately sovereign people, establishing a Government distinct from and subordinate to that sovereign, that freedom of action which has herein before been called social or civil liberty may also have, in the local law of each State, a constitutional basis ; or, by being acknowledged or established by the authority which constitutes the Government, may be independent of the power held by the latter.

§ 477. When the powers held by the national Government

<sup>1</sup> *Ante*, § 359.

<sup>2</sup> *Ante*, §§ 355-357.

<sup>3</sup> That is, no direct appeal to the administration. There are many publications by private persons, singly or associated, appealing to public sentiment, in which it is held that the holding of slaves is now illegal in every one of the States, because contrary to national law contained in this and other provisions of the Constitution ; see the Unconstitutionality of Slavery, by Lysander Spooner, p. 105 ; Abolition Documents, No. 2, containing a speech in House of Rep. April 4, 1856, by Mr. Granger, of New York, among many other publications of "anti-slavery" associations.

and those possessed by the several States, or by the people of each respectively, are to be discriminated in reference to their possible effect upon civil liberty, there is this very important difference between them, that the powers of the first are ascertained by their being distinctly and separately enumerated in the Constitution of the United States, and its allotted share of supreme powers consists only in those specified and such as are necessarily concomitant in order to render them operative. These powers, therefore, being granted in words having a precise and ascertained legal meaning, their boundaries may be defined with some degree of certainty. But the powers which, according to the evidence of the same instrument, are vested in the States or the people of the States severally, are described by way of residue, or reservation ; or, as being all sovereign state power not granted to the national Government nor prohibited to the States.

§ 478. It was herein before considered a necessary judicial doctrine and the first principle of positive law, (the subject of jurisprudence,) that sovereign power may always ordain that to be law which it has the physical force to make a coercive rule.<sup>1</sup>

<sup>1</sup> *Anse*, § 15. Since the distribution of the sum of powers (inherent in civil society and separately held by each independent nation or state) which are to be exercised in each State of the Union, is known by the delegation of specified powers to the national Government, the proposition in the text is more immediately connected with the local municipal laws than with the national municipal law of the U. S. It is here assumed as axiomatic ; no other proof being attempted than that offered in the first chapter, so far as that may show its harmony with other principles of general jurisprudence. That there are many persons occupying distinguished social and political positions in this country, who hold that a condition of slavery, whether chattel slavery or the involuntary servitude of a legal person, is not, cannot be, and never has been lawful or legal, is not disputed. But they do not, for that reason alone, constitute juridical authority, nor are they juristical authority, if the doctrine advocated involves a denial of the fundamental principle of all positive law. It will not be attempted to select, from the writings of such persons, any as being of more authority than others. But among them Mr. (Senator) Seward's will be allowed a distinguished position ; and, in illustration of such opinions, reference may be made to his Works, particularly vol. i. pp. 66, 71, 80, 312, 494, 514. Such assertions may be perfectly unanswerable, because they are stated as *a priori* principles requiring no proof ; or, the only proof is founded on an assumption that the author's idea of right is the state's conception of a jural rule, *regula jura*. In this respect they are neither better nor worse than propositions diametrically contradictory, such as are sometimes put forth by defenders of negro slavery. Compare the writings of Chancellor Harper, Governor Hammond, Dr. Sims, and Professor Dew, in a publication entitled, *The Pro-slavery Argument*, 12mo. Phila. 1856. These writers have rather the better, in this at least, that they do in some degree recognize a standard of right derived *a posteriori*, and independent of their individual moral judgment, and profess to find it in the history of civil societies.

But it was also insisted that there may be such a recognition of a moral rule for states or nations, that it must always be judicially presumed to be the constant will of the sovereign power, until positively repudiated by it.<sup>1</sup>

If it were supposed that a constituted Government could receive from the sovereign people, by grant, the whole of their power over each subject person or thing, then the Government might, as sovereign, repudiate all former restrictions acknowledged by the sovereign people, its creator and predecessor. But since by the fundamental law (law in the secondary sense) of each State of the Union the ultimate sovereignty of the people confessedly subsists as fully as at the time of the original constitution of the Government, if any abnegations of power on the part of the people existed at the time of the creation of the Government, they would still remain as the expressed will of the ultimate sovereign and limit the power of the administrative instrument.

Upon the supposition then, that in a state wherein the supreme power is publicly or popularly (nationally) invested, the organized Government may hold, by representation, all the power, belonging to the political sovereign creating it, which is not necessarily withheld by the fact of its subordinate existence, it is first of all important, for ascertaining the power of the several State Governments to affect civil liberty, to determine whether there are any principles, besides the *law* contained in the Constitution of the United States, which can be taken to be a moral rule restraining the action of the ultimate sovereignty in any of those States or in the people thereof, and, therefore,

Whether their induction is correct is another question. In a miscellany, entitled, *Leisure Labors*, by Joseph B. Cobb, Esq. 12mo. New York, 1858, it is asserted, p. 360, not only that neither the national nor any State Government can abolish slavery in any local jurisdiction of the U. S., but even, pp. 367, 387, that in Greece and Rome the government could not (i. e., had not the political power to) "destroy the relation of master and slave, or deprive the first of the labor and value of the last."

From the language of Mr. Justice Catron, in *Dred Scott's* case, 19 Howard, 519, it might be inferred that in his view *man* is properly described as *property*, or that under the term *property* men, as well as other *things*, are included; and that a freeman is well defined as a *man owned by himself*! "The plaintiff [Scott] claims to have acquired property in himself, and became free by being kept in Illinois during two years."

<sup>1</sup> *Ante*, pp. 460, 461.



necessarily binding on their several subordinate or constituted Governments.

§ 479. But where any administrative Government subsists under a form determined by law, properly so called it is evident that it cannot itself wield the whole of sovereign state power, one of whose characteristics is to be exercised in any form or mode its possessor may choose to employ.<sup>1</sup> In each State of the Union there is such a Government, acknowledged to subsist by the will of the sovereign people thereof, or to be subject to the public law creating it. So far as civil liberty consists in being controlled only by known laws proceeding from rightful authority, it is secured under each State Government, as under the Government of the United States, by those provisions of the public law which separate the functions of power and prescribe the forms of legislation.<sup>2</sup>

§ 480. In most of the older fifteen States a written Constitution of Government replacing the former colonial public law, and expressly founded on the assertion of the existence of a sovereignty in the people of the State, distinct from and superior to the powers exercised by the Government, was established during the revolutionary period, or before the establishment of the existing Constitution of the United States. But in two, viz., Connecticut and Rhode Island, while the people were acknowledged by the acts of the local legislative body, as well as in the formation of the national Constitution, to be the actual possessors of sovereignty, the form of the local Government remained such as it had been under the colonial charters, until a much later period, there being no specific acts of assumption of sovereignty by the political people of the former colony in any delegation of powers to newly constituted State Governments.

In these States, however, the popular investiture of local sovereignty had been more distinctly recognized, during the colonial period, than in the other provinces.

In these States, therefore, anterior to the adoption of a written State Constitution, the distinction between the power

<sup>1</sup> *Ante*, p. 424.

<sup>2</sup> *Ante*, § 363. 2 Curtis' Hist. Cons. 8. Wynehamer *agst.* The People, 8 Kernan, 391.

**of** the State and that of the administrative Government may **not** have been so clearly defined as in others. The separate or **residuary** powers of the State or of its people under the national (federal) Constitution being held by its administrative Government very much in the same manner as the sovereignty of the British empire is by parliament ; or, at least, as the local colonial sovereignty claimed by the colonists had been held by the colonial Governments ;<sup>1</sup> there being no positive restriction of the legislature other than the anterior colonial legislative declarations of rights, corresponding to the English Bill of Rights and the Great Charters.<sup>2</sup> There was, therefore, no visible restriction of the power of the legislatures of those States, during the period referred to, more than on that of the ultimately sovereign people, except such as was found in the nature of its political form or mode of existence with the three functions of power separately invested.<sup>3</sup>

§ 481. But though this might be the strict view of the then existing constitution, in these instances, still it could never have been practically held that the power of the legislative body was absolute over all private rights and relations, even where not controlled by the political union with the other States.

The common law of England, having a distinctly personal character as the law of individual rights,<sup>4</sup> and the principles of civil liberty proclaimed in the previous legislative history of the colony had, practically, the force of a written Constitution in restraining legislative discretion, and with greater distinctness than the common law of England in restraining parliament.<sup>5</sup>

<sup>1</sup> *Ante*, § 181.

<sup>2</sup> *Ante*, §§ 129, 180.

<sup>3</sup> See the case of *Wilkinson v. Leland and others*, 2 Peters, 627, where the powers of the legislature of Rhode Island, there then being no other Constitution than the Colonial Charter, were considered.

<sup>4</sup> *Ante*, § 187.

<sup>5</sup> *Fletcher v. Peck*, 6 Cranch, 135 ; *Marshall, C. J.*, "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power." *Calder v. Bull*, 3 Dallas, 387 ; *Mr. Justice Chase*, "I cannot subscribe to the *omnipotence of a State legislature* or that it is *absolute and without control* ; although its authority should not be *expressly* restrained by the *Constitution or fundamental law* of the State. The people of the *United States* erected their Constitutions or forms of government to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their *persons and property* from violence. The pur-

§ 482. In each of the several States written Constitutions are now in existence, adopted by the political people of each, having the effect of private as well as of public law. The scope of legislative power in the local Government is, therefore, more definitely determined than during the colonial period ; though its extent must still be a question in many cases, since it is impossible to define it completely by any written instrument, even if such instrument should be enlarged to the dimensions of a code. The judiciary of each State in deciding upon the constitutional extent of the legislative power is obliged to refer, in all cases, to previously existing rules, affecting relations of private persons, as guides to the construction and interpretation of the

poses for which men enter into society will determine the nature and terms of the social compact ; and as *they* are the foundation of the legislative power *they* will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free Republican governments, that no man should be compelled to do what the laws do not require, nor to refrain from acts which the laws permit. There are acts which the Federal or State legislature cannot do without exceeding their authority. There are certain civil principles in our free republican Governments, which will determine and overrule an apparent and flagrant abuse of legislative power ; as to authorise manifest injustice by positive law ; or to take away that security for personal liberty or private property, for the protection whereof the Government was established. But an Act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments founded on express compact and on republican principles, must be determined by the nature of the power on which it is founded. A few instances," &c., &c. (Italicised as in Rep.) See also *Wilkinson v. Leland*, 2 Peters, 656 ; *Dash v. Van Kleeck*, 7 Johnson, 477 ; *Goshen v. Stonington*, 4 Conn. 225.

To the contrary seem to be, *Bradde v. Bramfield*, 2 Watts and Serg. 285 ; *Harvey v. Thomas*, 10 Watts, 66 ; Senator Verplank in *Cochran v. Van Surley*, 20 Wendell, 381. See the opinions compared in E. Fitch Smith's Comm. ch. vii. *Wynehamer v. The People*, 8 Kernan, 391, Comstock, J., "I entertain no doubt that, aside from the special limitations of the Constitution, the legislature cannot exercise powers which are in their nature essentially judicial or executive. These are by the Constitution distributed to other departments of the Government. It is only the 'legislative power' which is vested in the Senate and Assembly. But where the Constitution is silent, and there is no clear usurpation of the powers distributed to other departments, I think there would be great difficulty and great danger in attempting to define the limits of this power. Chief Justice Marshall said, (*Fletcher v. Peck*, *supra*,) 'How far the power of giving the law may involve every other power in cases where the Constitution is silent, never has been and perhaps never can be definitely stated.' That very eminent judge felt the difficulty ; but the danger was less apparent then than it is now, when theories alleged to be founded in natural reason or inalienable rights, but subversive of the just and necessary powers of Government, attract the belief of considerable classes of men, and when too much reverence for government and law is certainly among the least of the perils to which our institutions are exposed. I am reluctant to enter upon this field of inquiry, satisfied as I am that no rule can be laid down in terms which may not contain the germ of great mischief to society, by giving to private opinion and speculation a license to oppose themselves to the just and legitimate powers of Government."

the written Constitution itself ; and, therefore, in some degree, to recognize another law existing independently of the constituted legislature. It will always be difficult to determine what portion of the law existing at any one particular time is fundamental and constitutional ; what part is to be regarded as fixed in the will of the constituting authority and to be judicially supposed to have been taken by it for a principle limiting all republican governments. It is also always necessary to discriminate a “natural and necessary law of nations,” applied to the internal existence of states. This, perhaps, is nearly the same as the distinction of laws into laws in the primary and in the secondary senses ;<sup>1</sup> a law or usage being considered to have the character of natural or necessary law of nations, (whether affecting private persons or states,) where it has always been judicially viewed as the statement of a mode of action or a recognition of a condition of things ; as, for example, the principle alluded to by Holt, of a man’s not being ever a judge in his own cause.<sup>2</sup>

Being private as well as public law, the various constitutional provisions which may affect freedom or its contraries in the limited sense herein particularly considered, will be properly comprehended in a historical summary of the legislation of the several States affecting this topic.

§ 483. It has been herein before supposed that by the Revolution a certain national or general authority became transferred from the king and parliament of England to the integral people of the United States. This is taken to be a necessary assumption from the recognition of the present Constitution and the events which caused that recognition. But the same reasoning led to the conclusion that whatever powers the present Constitution declares to be vested in the several States, were in fact vested in them by the Revolution, or rendered by it entirely independent and sovereign, and were not derived from that Constitution.<sup>3</sup>

According to this view there was no longer a national central power, maintaining within each State the common law of rights

<sup>1</sup> *Ante*, §§ 48, 49.

<sup>2</sup> *Ante*, p. 127.

<sup>3</sup> *Ante*, § 469.

and privileges of persons of European or Caucasian race, as it had been sustained under the British imperial power ; except as it might be sustained internationally or *quasi-internationally* between the States, operating as public and private law. And, if there had been any national law affecting the condition of other persons to whom the common law of England did not apply as a personal law, it also ceased to have a national extent on the occurrence of the same events ; or had, thereafter, only such effect as was derived from the international provisions of the Constitution.

Hence, whether there would have been a common law in each State which, in the absence of a State Constitution, could have been judicially recognized as a check on the legislature, would be, in each State, before and after the adoption of a State Constitution, a question of the same sort as that of the effect of common law in England against the power of parliament.

§ 484. But though the common law or every national law of the rights of persons may have ceased to have any continuing basis in a national *authority*, it is plain that, on the principle of the continuous existence of laws, the distinction of two races and of two personal laws applying to those races would continue to be recognized by the judicial tribunals of each State, in the same degree as before, until changed by the thereafter several and independent legislative power thereof ; and that the laws which before were received in the State, as personal laws applying to aliens and as private international law, would continue to be recognized ; until changed by the State for its own limits, or by the national power held by the general Government over this class of persons in all the States.

§ 485. The fourth of the Articles of the Confederation of November 17, 1777, may have been intended to secure in the several States some international allowance of rights and obligations which had before had a personal and national extent in all the colonies as parts of the British empire. But the effect of this Article on personal condition does not seem to have ever been made a subject of judicial inquiry during the existence of the Confederation. The Article may be thought to have the

Form of private law, that is, law which of itself maintains the existence of legal rights in private persons. But since the enacting power was not represented by a general administrative Government, organized with an investiture of the three functions of sovereignty for the purpose of applying municipal (internal) law, the rights declared by that Article had no national guarantee available for the private persons by whom they might have been claimed ; and the Article must have depended on the several juridical will of each State for its coercive effect, having in that respect only the force of a public international compact. It would appear, therefore, that until the formation of the present Constitution of the United States the only restriction on the legislative power of the several States, in reference to persons domiciled in other States of the Union, would (irrespective of restrictions in the Constitutions of these States themselves) have been these treaty provisions in the Articles of Confederation, and the undetermined force of common law to preserve itself, in its own courts, against the action of a legislating Government.

§ 486. The sum of all sovereign powers to affect private persons in any part of the United States may, or may not, have been exercised, during the Revolutionary period or during the Confederation, in a different manner, or according to a somewhat different distribution of those powers, from that existing under the present Constitution. But, for the present purpose, it is enough to know that the powers vested in the Continental Congress or in the Congress of the Confederation were certainly not *greater*, in any respect, than those now vested in the present national Government, and did not, in legislation, act so directly on private persons within the limits of the several States. No change, therefore, could have been made in the status or condition of private persons within the several States by the national legislation of the United States anterior to the present national Constitution.

§ 487. Since the provisions of the Constitution of the United States which create or maintain relations of private persons do not determine the possession of individual rights, except inter-

nationally or *quasi-internationally*, and the powers of the national Government over persons and things within the limits of the several States can determine only certain relative rights not primarily entering into the relations of legal status or condition,<sup>1</sup> the laws affecting individual rights and relations incident to conditions of freedom or its contraries<sup>2</sup> within the States must

<sup>1</sup> *Ante*, p. 488.

<sup>2</sup> The expression "freedom and its opposites," has been used repeatedly in previous chapters. A note in Coleridge's *Church and State*, p. 24, has suggested that the term *contrary* should have been employed instead of *opposite*. "Let me call attention to the essential difference between 'opposite' and 'contrary.' Opposite powers are always of the same kind, and tend to union, either by equipoise or by a common product. Thus the + and — poles of the magnet, thus positive and negative electricity are opposites, sweet and bitter are contraries. The feminine character is opposed to the masculine; but the effeminate is its contrary. Even so in the present instance, [the topic which he here considers,] the interest of permanence is opposed to that of progressiveness; but so far from being contrary interests, they, like the magnetic forces, suppose and require each other."

In some recent defences of negro slavery the argument is based on the idea that freedom and slavery are not contraries, but opposites; or that they "suppose and require each other." A prominent example is found in the speech of Senator Hammond, of South Carolina, in the recent debates on the Kansas question, in the U. S. Senate, March 4, 1858. "In all social systems there must be a class to do the menial duties, to perform the drudgery of life. That is, a class requiring but a low order of intellect and but little skill. Its requisites are vigor, docility, fidelity. Such a class you must have, or you would not have that other class which leads progress, civilization, and refinement. It constitutes the very mud-sill of society and of political government; and you might as well attempt to build a house in the air, as to build either the one or the other, except on this mud-sill. Fortunately for the South, she found a race adapted to that purpose to her hand. A race inferior to her own, but eminently qualified in temper, in vigor, in docility, in capacity to stand the climate, to answer all her purposes. We use them for our purpose, and call them slaves. We found them slaves by the 'common consent of mankind,' which, according to Cicero, 'lex nature est,' the highest proof of what is Nature's law. We are old-fashioned at the South yet; it is a word discarded now by 'ears polite.' I will not characterize that class at the North with that term; but you have it; it is there, it is everywhere, it is eternal.

"The Senator from New York said, yesterday, that the whole world had abolished slavery. Aye, the *name*, but not the *thing*; all the powers of the earth cannot abolish that. God only can do it when he repeals the *fiat*, 'the poor ye always have with you;' for the man who lives by daily labor, and scarcely lives at that, and who has to put out his labor in the market, and take the best he can get for it; in short, your whole hireling class of manual laborers and 'operatives,' as you call them, are essentially slaves. The difference between us is, that our slaves are hired for life and well compensated; there is no starvation, no begging, no want of employment, among our people, and not too much employment either. Yours are hired by the day, not cared for, and scantily compensated, which may be proved in the most painful manner, at any hour, in any street in any of your large towns. Why, you meet more beggars in one day, in any single street of the city of New York, than you would meet in a lifetime in the whole South. We do not think that whites should be slaves either by law or necessity. Our slaves are black, of another and inferior race. The *status* in which we have placed them is an elevation. They are elevated from the condition in which God first created them, by being made our slaves. None of that race on the whole face of the globe can be compared with the slaves of the South. They are happy, content, unaspiring, and utterly incapable, from intellectual weakness, ever to give us any trouble by their aspirations. Yours are white, of your own race; you are brothers



rest on the exercise of the powers held by the several people of each State since the period of the independent existence of the United States, subject only to the international provisions of the Constitution, and also, though in a different sense of subjection, to that international rule which is law in an imperfect sense only when states are spoken of as its subjects.

§ 488. According to the view herein before taken of the powers of the national Government over the Territories of the United States, the District of Columbia, &c., Congress, in the exercise of the legislative power of the United States, stands in the same relation, towards persons and things in those several jurisdictions, which the several State *Governments* occupy in reference to persons and things within the limits of their respective States, and is controlled only by the provisions of the Constitution operating as public or as private law, and, perhaps, also by a "common law," identified with the juridical will of the people of the United States.<sup>1</sup>

§ 489. The question how far any one of the State Governments, or the national Government legislating in and for the Territories, &c., has power to determine the existence of conditions of freedom or its contraries within one of these several jurisdictions, is properly to be made a separate question under the local law of each. There is, however, an inquiry which may be considered generally with reference to all these Governments, which is this : it being assumed that the legislative power held by any one such Government is limited by *constitutional provisions* having the effect of private law ; or, in other words, by those provisions in the Constitutions which, like the English bills of rights and the colonial charter guarantees, secure rights

of one blood. They are your equals in natural endowment of intellect, and they feel galled by their degradation. Our slaves do not vote. We give them no political power. Yours do vote, and being the majority, they are the depositaries of all your political power. If they knew the tremendous secret, that the ballot box is stronger than "an army with banners," and could combine, where would you be ? Your society would be reconstructed, your government overthrown, your property divided, not as they have mistakenly attempted to initiate such proceedings by meetings in parks, with arms in their hands, but by the quiet process of the ballot box. You have been making war upon us to our very hearth stones. How would you like for us to send lecturers and agitators North, to teach these people this, to aid in combining, and to lead them ?"

<sup>1</sup> Compare *ante*, § 481, note.

to private persons,<sup>1</sup> and it being also assumed that like clauses having like effect, may be found in all these Constitutions, including the Constitution of the United States, whether the Governments organized under such Constitutions are thereby restricted either in establishing, or in abrogating, conditions either of freedom or of its contraries ; or in their power to establish, or to abrogate, relations incident to conditions of freedom or of bondage.<sup>2</sup>

§ 490. In this inquiry it is proper first to refer to whatever juridical authority<sup>3</sup> may exist on this topic, and afterwards to

<sup>1</sup> That is, written guarantees, distinguished from that indefinite restriction which may or may not exist by reason of the fact that the organized Government is not the ultimate possessor of the sovereign powers exercised by it. *Ante*, § 481.

<sup>2</sup> On the principle of the continuation of laws, it has already been insisted the rights and obligations, incident to relations existing under previous laws, would continue after the establishment of the new Governments, until changed by their authorized legislation. It is needless to refer to judicial action, under both the national and the State Governments, maintaining conditions of freedom and its contraries under pre-existing laws. These Constitutions might however contain enacting provisions alternative of pre-existing laws. It will be shown hereinafter that in Massachusetts a declaration in the Constitution of 1780, that the enjoyment of "natural rights" is one of the ends of Government, and attributing to all persons certain rights, as natural, which are inconsistent with a condition of slavery, was taken by the courts to be a legislative abrogation of slavery. See Parsons, C. J., in 4 Mass. R. 123. In other States, whose Constitutions contain declarations very similar, the same effect has never been attributed to them. See H. St. George Tucker, President, in the Court of Appeals of Va., in *Betty et al. v. Horton*, (1833,) 5 Leigh's R. 622. The question here is of the personal *extent* of the law attributing rights, as described in the second chapter, or whether it has *universal* extent or not (*ante*, §§ 87, 88). In this connection it is a question of *internal* law, though it is similar to that distinction of laws of universal extent which arises in applying the rule of comity in private *international* law.

But such constitutional provisions as guarantee individual rights as *existing* rights without attributing them to all persons, more than is done in the clause "no man shall be deprived of life, liberty or property without due process of law," have never been held to operate as a legislative abrogation of slavery or institution of freedom.

<sup>3</sup> This juridical authority may be distinguished into two portions ; 1, *judicial decisions* of particular cases, in the determination of which the topic is supposed to be involved : 2, *juristical* opinion ; and in this may be included legislative practice, as being an assertion of public law by persons who, from their position, must be supposed to be conversant with the subject.

And it may here be observed, that a rule or principle of law is never established by *judicial* action alone. This proposition may not be readily accepted ; but it nevertheless appears, from the nature of the judicial function, that a decision by a judicial tribunal binds private persons only as to the rights and obligations involved in the particular case. In every science rules are *derived by induction*, and to this, there must be a collation and comparison of a number of otherwise unconnected instances or cases, corresponding to experiments in physics. In jurisprudence, general rules are thus obtained by juristical action. In England and America this juristical deduction takes place principally in the reported *judicial opinions*, and hence, in these countries it is very common to speak of a rule as depending on some *decision* of a case, in which this juristical action has been exhibited. In continental Europe the judges confine themselves more to a simple decision of the case before them. But the juristical de-

Compare the principle, declared by any such authority, with the general principles of jurisprudence and those doctrines of public law which are received as fundamental in this country ; taking them in connection with, or as they are indicated in, the history of free condition and its contraries, as it has herein before been exhibited.

§ 491. If the conditions of freedom and bondage are properly described as *contraries*, the legislative establishment of the one is also the abrogation of the other.

There is probably no judicial opinion on the question of the power of the ordinary legislature, under these Constitutions, to make free white persons slaves ; either chattel slaves or legal persons held in involuntary servitude for life. It seems to be generally supposed that no instances have occurred of such persons being reduced to such slavery under legislative enactment.

But from the summary of State legislation, to be hereinafter given,<sup>1</sup> it will appear that under the statute law of some of the States, negroes, mulattoes and, generally, persons not of European or Caucasian race, who before enjoyed personal liberty, might be reduced to slavery. And it would appear that such laws have received judicial sanction ; no question, it is believed, having been made of the power of the legislature in respect to such persons.<sup>2</sup>

§ 492. No judicial opinion earlier than that of the Supreme

duction is completed by private writers. Hence the treatises have with them greater authority than the so-called "elementary works" have with us. Compare the language of Ram, on Legal Judgment, p. 2, with that of Falck, *Juristische Ency.* § 10, *ante*, p. 25, n. 2, p. 26, n. 2.

See also, on this subject, Bacon's Aphorisms, 21-31, in *Advancement of Learn.* B. 8, c. 8. Senator Platt (afterwards Judge of the Supreme Court) in *Yates v. Lansing*, 9 Johnson, 414, "The decisions of Courts are not *the law*, they are only *evidence of the law*. And this evidence is stronger or weaker according to the number and uniformity of adjudications, the union or dissension of the Judges, the solidity of the reasons on which the decisions are founded, and the perspicuity and precision with which those reasons are expressed. The weight and authority of judicial decisions depend also on the character and temper of the times in which they are pronounced. An adjudication at a moment when turbulent passions or revolutionary frenzies prevail deserves much less respect than if it were made at a season propitious to impartial inquiry and calm deliberation."

<sup>1</sup> And see Stroud's Sketch, 2d ed. p. 24-30.

<sup>2</sup> Whether under these statutes white persons have not sometimes been reduced to slavery may depend on the answer to the question, how is a negro, mulatto, &c., to be distinguished from a person of white, or European or Caucasian race?

Court of the United States, in *Dred Scott v. Sandford*, 19 Howard, 394, appears to be on record to the effect that, if the political power and jurisdiction over the Territories, &c., is vested in the national Government,<sup>1</sup> Congress has not the power to determine whether slavery shall or shall not exist therein, or whether a presently legal right of ownership, in a domiciled inhabitant, in respect to a negro slave shall or shall not continue; nor any which declares that such power is one not within the ordinary scope of powers belonging to such limited Governments as have existed in and for the United and several States. Nor is there any other holding that, if by the Constitution of a State, or by that of the United States operating with like effect, the right of private property or to private property is guaranteed by a declaration that no man shall be deprived of his property without due process of law, the right of a person, being a resident or domiciled inhabitant or citizen of one of these jurisdictions, in respect to a negro lawfully held by him, before and presently, as a slave or in involuntary servitude, is a right of *property* or to *property*, which under this constitutional guarantee cannot be affected by the legislative power held by the State Government, in and for a State, or by that held by Congress in and for a Territory, &c., as the case may be.

§ 493. In this case, however, it was held by the majority of the court that Congress has no power to abolish or prohibit slavery in the Territories of the United States.<sup>2</sup> And in the Opinion of the Court, delivered by Chief Justice Taney, it is held that the provisions in the Constitution, which have already

<sup>1</sup> Whether the supreme governmental power or sovereignty, or any portion of it, is severally or separately vested in the inhabitants of such Territory, so that they are in its exercise independent of the national power as are the people of a *State* in their several sovereignty, is an entirely different question, one of public law, and to be considered in another place. Compare *ante*, §§ 348, 397.

<sup>2</sup> Mr. Justice Catron, 19 Howard, 519, reciting the words of the act of Congress of 1820, commonly called the Missouri Compromise, "That in all that territory, ceded by France to the United States, which lies north of thirty-six degrees thirty minutes north latitude, slavery and involuntary servitude shall be, and are hereby, for ever prohibited;" says, "The first question presented on this act is whether Congress had power to make such a compromise. For if power was wanting, then no freedom could be acquired by the defendant under the act." In denying the power of Congress, concurred Chief Justice Taney, Justices Wayne, Grier, Daniel, Campbell and Catron. Justices McLean and Curtis dissenting, and Mr. Justice Nelson thinking the decision of the question not necessary for the determination of the case.

been referred to as having the effect of private law throughout the entire dominion of the United States, especially the clause guaranteeing to the private citizen his possession of *property*, “No person shall be deprived of life, liberty, or property without due process of law,” apply to slaves *as property*, or that, in reference to such guarantee they are to be considered *property*, in the same degree as domestic animals and inanimate chattels. The passage in which this is enunciated, is on page 451 of the report, and in continuation of that part of the Opinion which has herein already been cited in a note to pages 463, 464 :—

“And if Congress itself cannot do this—if it is beyond the powers conferred on the Federal Government—it will be admitted, we presume, that it could not authorize a Territorial Government to exercise them. It could confer no power on any local Government, established by its authority, to violate the provisions of the Constitution.

“It seems, however, to be supposed, that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States. And the laws and usages of nations, and the writings of eminent jurists upon the relation of master and slave and their mutual rights and duties, and the powers which Governments may exercise over it, have been dwelt upon in the argument.

“But in considering the question before us, it must be borne in mind that there is no law of nations standing between the people of the United States and their Government, and interfering with their relation to each other. The powers of the Government, and the rights of the citizen under it, are positive and practical regulations plainly written down. The people of the United States have delegated to it certain enumerated powers, and forbidden it to exercise others. It has no power over the person or property of a citizen but what the citizens of the United States have granted. And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government, or take from the citizens the rights they have re-

served. And if the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government.

“Now, as we have already said in an earlier part of this opinion, upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution.<sup>1</sup> The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words—too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

“Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void.”

<sup>1</sup> Referring apparently to page 425, where it is said, in discussing the question, whether a negro may be a citizen, “The only two provisions which point to them and include them, [the reference is here to the “African race,”] treat them as property, and make it the duty of the Government to protect it; no other power, in relation to this race, is to be found in the Constitution, and as it is a Government of special, delegated powers, no authority beyond these two provisions can be constitutionally exercised. The Government of the United States had no right to interfere for any other purpose but that of protecting the rights of the owner, leaving it altogether with the several States to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society may require. The States evidently intended to reserve this power exclusively to themselves.” The Chief Justice does not explain how, from the fact that by the Constitution the condition of negroes is left to the powers of the several States, it may follow that the chattel condition of a negro is maintained by the law which rests upon the national powers, and has national extent.



§ 494. Mr. Justice Wayne particularly noticed only the question of pleading, but said, on page 454 of the report, "Concurring as I do entirely in the opinion of the court as it has been written and read by the Chief Justice—without any qualification of its reasoning or its conclusions—I shall neither read nor file an opinion of my own in this case, which I prepared when I supposed it might be necessary and proper for me to do so." And at the conclusion of his remarks, page 456, said: "I have already said that the opinion of the court has my unqualified assent."

Mr. Justice Grier, on page 469 of the report, after expressing his concurrence in the opinion of Mr. Justice Nelson on the questions discussed by him, said: "I also concur with the opinion of the court as delivered by the Chief Justice, that the act of Congress of 6th March, 1820, is unconstitutional and void." It does not otherwise appear how far Judge Grier agreed in the reasoning of the Chief Justice as well as the conclusions, though there is a strong presumption that that reasoning was approved of by him.

§ 495. Justices Daniel and Campbell appear to have rested their opinions, against the constitutionality of the act of Congress, not so much on this view of the Constitution operating as private law in the Territories for the protection of individual slave owners, the doctrine of the Chief Justice, as on their views of that instrument regarded as the evidence of antecedent possession of sovereign power, or on one of those theories of State sovereignty by which the instrument, as public law, may be construed.

Both Justices appear to have thought that the legislative (juridical) power, by which the status or condition of private persons in the Territories is to be determined, is not vested in the national Government as representing the integral people of the United States. Though Judge Daniel is not so clear as is Judge Campbell in indicating by what other possessors of sovereign power such status or condition is to be determined.

§ 496. Mr. Justice Campbell speaks of the act of Congress as an infringement of rights of the *States*. Judge Daniel's lan-



guage conveys the idea that, in prohibiting slavery, it is the right of private persons, a right under private law that would be violated in the case of the immigrant slave owner ; rather than the sovereign juridical right of the State from which he came which would be infringed. On page 488, Judge Daniel observes, "it has been attempted to convert this prohibitory provision of the act of 1820, not only into a weapon with which to assail the inherent, the *necessarily* inherent, powers of independent sovereign Governments, but into a mean of forfeiting that equality of rights and immunities which are the birthright or the donative from the Constitution of every citizen of the United States within the length and breadth of the nation. In this attempt there is asserted a power in Congress, whether from incentives of interest, ignorance, faction, partiality, or prejudice, to bestow upon a portion of the citizens of this nation that which is the common property and privilege of all ; the power, in fine, of confiscation, in retribution for no offence, or, if-for an offence, for that of accidental locality only."

After referring to the "territory or other property" clause, Mr. Justice Daniel, on the next page, observes : "And upon every principle of reason or necessity, this power to dispose of and to regulate the *territory* of the nation could be designed to extend no farther than to its preservation and appropriation to the uses of those to whom it belonged, viz. the nation. Scarcely any thing more illogical or extravagant can be imagined than the attempt to deduce from this provision in the Constitution a power to destroy or in any wise to impair the civil and political rights of the citizens of the United States, and much more so the power to establish inequalities amongst those citizens by creating privileges in one class of those citizens, and by the disfranchisement of other portions or classes, by degrading them from the position they previously occupied.

"There can exist no rational or natural connection or affinity between a pretension like this and the power vested by the Constitution in Congress with regard to the Territories ; on the contrary, there is an absolute incongruity between them.

"But whatever the power vested in Congress, and whatever

the precise subject to which that power extended, it is clear that the power related to a subject appertaining to the *United States*, and one to be disposed of and regulated for the benefit and under the authority of the *United States*. Congress was made simply the agent or *trustee* for the United States and could not, without a breach of trust and a fraud, appropriate the subject of the trust to any other beneficiary or *cestui que trust* than the United States, or to the people of the United States, upon equal grounds, legal or equitable. Congress could not appropriate that subject to any one class or portion of the people to the exclusion of others, politically and constitutionally equals ; but every citizen would, if any *one* could claim it, have the like rights of purchase, settlement, occupation, or any other right in the national territory.

“ Nothing can be more conclusive to show the equality of this with every other right in all the citizens of the United States, and the iniquity and absurdity of the pretension to exclude or to disfranchise a portion of them because they are the owners of slaves, than the fact that the same instrument which imparts to Congress its very existence, and its every function guaranties to the slaveholder the title to his property, and gives him the right to its reclamation throughout the entire extent of the nation ; and, farther, that the only private property which the Constitution has *specifically recognized*, and has imposed it as a direct obligation both on the States and the Federal Government to protect and *enforce*, is the property of the master in his slave ; no other right of property is placed by the Constitution upon the same high ground, nor shielded by a similar guaranty.

“ Can there be imputed to the sages and patriots by whom the Constitution was framed, or can there be detected in the text of that Constitution, or in any rational construction or implication deducible therefrom, a contradiction so palpable as would exist between a pledge to the slave-holder of an equality with his fellow-citizens, and of the formal and solemn assurance for the security and enjoyment of his property, and a warrant given, as it were *uno flatu*, to another, to rob him of that property, or to subject him to proscription and disfranchisement for

possessing or for endeavoring to retain it? The injustice and extravagance necessarily implied in a supposition like this, cannot be rationally imputed to the patriotic or the honest, or to those who were merely sane."

In thus speaking, in this last paragraph, of "the formal and solemn assurance for the security and enjoyment of his property," the allusion seems to be to those provisions of the Constitution which relate to rights in respect to slaves, and which were particularly referred to in the preceding paragraph. It is not clear whether Judge Daniel would agree with the Chief Justice in declaring slaves to be recognized, independently of those provisions, as property; and protected, as other property, by the fifth article of the Amendments to the Constitution operating as a bill of rights.

§ 497. Mr. Justice Campbell said, "I concur in the judgment pronounced by the Chief Justice, but the importance of the cause, the expectation and interest it has awakened, and the responsibility involved in its determination, induce me to file a separate opinion."

On page 513, Judge Campbell observes that "the advocates for Government sovereignty in the Territories have been compelled to abate a portion of the pretensions originally made in its behalf, and to admit that the constitutional prohibitions upon Congress operate in the Territories. But a constitutional prohibition is not requisite to ascertain a limitation upon the authority of the several departments of the Federal Government. Nor are the States or people restrained by any enumeration or definition of their rights or liberties. To impair or diminish either, the department must produce an authority from the people themselves, in their Constitution," &c. It seems to be Judge Campbell's doctrine that the organized Government of the United States, has not, as a whole, any power whatever in the Territories, or that the powers of the Executive and Judiciary are only incidental or ancillary to the legislative powers which may have been granted to Congress,<sup>1</sup> and that Congress has in

<sup>1</sup> The necessity of determining, in the first instance, the mode of existence of the people of the U. S., the authors of the Constitution, as a question involved in the de-

the Territories only the general powers which it may exercise for any part of the United States, and certain special powers, in relation to lands, &c., belonging to the United States, derived from the "territory and other property" clause. Judge Campbell does not, therefore, rely, with the Chief Justice, on that part of the Constitution which protects the individual subject equally against every department of the national or federal Government.

From the greater part of his argument on this point, pp. 506—514, it would seem to be his opinion that the inhabitants of the Territory, or a certain portion of them, forming a political people, have therein the residue of sovereignty,<sup>1</sup> or the powers not specifically granted to the national Government, although another doctrine is at the same time enunciated as antagonistic to the power claimed for Congress, which would, apparently, conflict with the theory of a residuary sovereignty inherent in the people of a Territory. This (if rightly apprehended) is, that the States severally, and as political persons, have juridical power in the Territories; or, that they may and do extend their laws into the Territories to determine the rights and obligations of persons therein, who anteriorly had been domiciled within their several State limits; that "the Constitution and laws of one or more States determining property," cannot be "proscribed" by altering or destroying the effects of those laws upon the relations of such persons after their emigration and settlement in the Territory; that the duty of the national Government is, as the agent of the States severally, to maintain these effects in the Territories. See page 516 of the report. In other words (using the nomenclature herein before adopted) the doctrine is, that the national Government is bound to actualize or realize, in the Territory, the rights and obligations of private persons which have become existent under "the Constitution and laws determining property" in the State wherein such

termination of private rights, has never been more apparent than in these questions respecting the law of the territories. Judge Campbell's view seems to coincide with that stated *ante*, in the second paragraph of note on p. 409, that there is no integral people of the U. S., and to go to the extreme of that theory.

<sup>1</sup> Compare *ante*, §§ 876, 897.

persons were previously domiciled, and has no power to determine the continuance of those rights and obligations, even when the persons to whom they have been attributed have become domiciled in the Territory. The same doctrine would seem to limit the power which Mr. Justice Campbell supposed to belong to the people of the Territory.

Although this is properly a question of public law, or one of the location of sovereign power, the doctrine is, as stated by Judge Campbell, also operative as private law ; that is, it is a rule by which judicial tribunals may determine rights and obligations of private persons in the Territories. On page 514, Judge Campbell proceeds to say, after enumerating certain subjects of legislation as being within the power of Congress : "I admit that to mark the bounds for the jurisdiction of the Government of the United States within the Territory, and of its power in respect to persons and things within the municipal subdivisions it has created, is a work of delicacy and difficulty, and, in a great measure, is beyond the cognizance of the judiciary department of that Government. How much municipal power may be exercised by the people of the Territory, before their admission to the Union, the courts of justice cannot decide. This must depend for the most part on political considerations, which cannot enter into the determination of a case of law or equity. I do not feel called upon to define the jurisdiction of Congress. It is sufficient for the decision of this case to ascertain whether the residuary sovereignty of the States or people has been invaded by the eighth section of the act of 6th March, 1820, I have cited, in so far as it concerns the capacity and *status* of persons in the condition and circumstances of the plaintiff and his family.<sup>1</sup>

" These States, at the adoption of the Federal Constitution, were organized communities, having distinct systems of muni-

<sup>1</sup> On page 509, Mr. Justice Campbell says of "the expedient contained in the eighth section" of the Act of Congress, *the Missouri Compromise*, "For the first time in the history of the country has its operation been embodied in a case at law, and been presented to this court for their judgment. The inquiry is, whether there are conditions in the Constitutions of the Territories which subject the capacity and *status* of persons within their limits to the direct action of Congress. Can Congress determine the condition and *status* of persons who inhabit the Territories?"

cial law, which, though derived from a common source, and recognizing in the main similar principles, yet in some respects had become unlike, and on a particular subject promised to be antagonistic.

“ Their systems provided protection for life, liberty, and property, among their citizens, and for the determination of the condition and capacity of the persons domiciled within their limits. These institutions, for the most part, were placed beyond the control of the Federal Government. The Constitution allows Congress to coin money, and regulate its value ; to regulate foreign and Federal commerce ; to secure, for a limited period, to authors and inventors, a property in their writings and discoveries ; and to make rules concerning captures in war ; and, within the limits of these powers, it has exercised rightly, to a greater or less extent, the power to determine what shall and what shall not be property.

“ But the great powers of war and negotiation, finance, postal communication, and commerce, in general, when employed in respect to the property of a citizen, refer to, and depend upon, the municipal laws of the States, to ascertain and determine what is property, and the rights of the owner, and the tenure by which it is held.

“ Whatever these Constitutions and laws validly determine to be property, it is the duty of the Federal Government, through the domain of jurisdiction merely Federal, to recognize to be property.

“ And this principle follows from the structure of the respective Governments, State and Federal, and their reciprocal relations. They are different agents and trustees of the people of the several States, appointed with different powers and with distinct purposes, but whose acts, within the scope of their respective jurisdictions, are mutually obligatory. They are respectively the depositories of such powers of legislation as the people were willing to surrender, and their duty is to co-operate within their several jurisdictions to maintain the rights of the same citizens under both Governments unimpaired. A proscription, therefore, of the Constitution and laws of one or more

States, determining property, on the part of the Federal Government, by which the stability of its social system may be endangered, is plainly repugnant to the conditions on which the Federal Constitution was adopted, or which that Government was designed to accomplish. Each of the States surrendered its powers of war and negotiation, to raise armies and to support a navy, and all of these powers are sometimes required to preserve a State from disaster and ruin. The Federal Government was constituted to exercise these powers for the preservation of the States, respectively, and to secure to all their citizens the enjoyment of the rights which were not surrendered to the Federal Government."

On page 516, the same judge observes: "This court have determined that the intermigration of slaves was not committed to the jurisdiction or control of Congress.<sup>1</sup> Wherever a master is entitled to go within the United States, his slave may accompany him, without any impediment from, or fear of, congressional legislation or interference. The question then arises whether Congress, which can exercise no jurisdiction over the relations of master and slave within the limits of the Union, and is bound to recognize and respect the rights and relations that validly exist under the Constitutions and laws of the States, can deny the exercise of those rights, and prohibit the continuance of those relations, within the Territories. And the citation of State statutes prohibiting the immigration of slaves, and of the decisions of State courts enforcing the forfeiture of the master's title in accordance with their rule, only darkens the discussion. For the question is, have Congress the municipal sovereignty in the Territories which the State Legislatures have derived from the authority of the people and exercise in the States? And this depends upon the construction of the article in the Constitution before referred to. And, in my opinion, that clause confers no power upon Congress to dissolve the relations of the master and slave on the domain of the United States, either within or without any of the States."

<sup>1</sup> Referring probably to *Groves v. Slaughter*, 15 Peters, 449.



On the supposition then that the national Government does hold, in and for the Territory, those powers which a State Government holds in and for a State,<sup>1</sup> it does not appear that Judge Campbell would agree with the Chief Justice, that the slaveholder's right is protected there by the private law of the Constitution, operating like a bill of rights in the guarantee of private *property*.

§ 498. Mr. Justice Catron, on pages 519–523, maintains, as firmly as any other member of the court, that the only valid legislation operating in the Territories is that proceeding from power held by Congress, and appears to be of the opinion that all the ordinary powers of a *State* Government have, by the words of the Constitution, been granted to Congress. But Judge Catron finds that the power of Congress in the Territory of Louisiana is restricted by the conditions of the treaty, of cession, made with France in 1803 (see pages 524–528). This doctrine, which is the ground principally relied on by Judge Catron in the decision of the question, will be further considered in a later portion of this work.

But notwithstanding his view of the powers of Congress in the Territories, as above stated, Judge Catron appears at the same time to be, in some degree, with either Judge Daniel or Judge Campbell in their doctrines of the limitation of the power of Congress in all the Territories, as respects a right of “equality” belonging to the *States* or to the *citizens* of the States.

On page 526 of the report, after referring to the cessions made by Georgia and North Carolina of western territory, and to the fact that no guaranty was required by Georgia from the United States for the protection of slave property, Mr. Justice Catron says, “The Federal Constitution was relied on to secure the rights of Georgia and her citizens during the Territorial condition of the country. She relied on the indisputable truths, that the States were by the Constitution made equals in political rights and equals in the right to participate in the common property of all the States United, and held in trust for them. The Constitution having provided that the ‘citizens of

<sup>1</sup> *Ante*, p. 528.

each State shall be entitled to all privileges and immunities of citizens of<sup>1</sup> the several States,' the right to enjoy the territory as equals was reserved to the States, and to the citizens of the States respectively. The cited clause is not that the citizens of the United States shall have equal privileges in the Territory, but the citizen of each State shall come there in right of his State, and enjoy the common property. He secures his equality through the equality of his State, by virtue of that great fundamental condition of the Union, the equality of the States.

"Congress cannot indirectly what the Constitution prohibits directly."<sup>2</sup> If the slave-holder is prohibited from going to the Territory with his slaves, who are parts of his family in name and in fact,<sup>3</sup> it will follow that men owning lawful property in their own States, carrying with them the equality of their State to enjoy the common property, may be told, you cannot come here with your slaves, and he will be held out at the border. By this subterfuge, owners of slave property, to the amount of thousands of millions, might be almost as effectually excluded from removing into the Territory of Louisiana north of thirty-six degrees thirty minutes, as if the law declared that owners of slaves, as a class, should be excluded, even if their slaves should be left behind. Just as well might Congress have said to those of the North, you shall not introduce into the territory south of said line your cattle and horses, as the country is already overstocked, nor can you introduce your tools of trade, or machines, as the policy of Congress is to encourage the culture of sugar and cotton south of the line, and so to provide that the Northern people shall manufacture for those of the South, and barter for the staple articles slave labor produces. And thus the Northern farmer and mechanic would be held out, as

<sup>1</sup> The clause in Art. iv, sec. 2, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." It would appear from this that, in the judge's opinion, the slave-holder's right under the law of his former residence is guaranteed even when the Territory becomes a State, and if so, it must be equally guaranteed in all the older States.

<sup>2</sup> Referring, apparently, to the clause above cited.

<sup>3</sup> Here a somewhat different theory of the right of slave-holders is intimated, that slavery is a relation between persons, one of the relations of family, like that of husband and wife, parent and child. It can hardly be meant that in the slave-holding States wives and children are property.

the slave-holder was for thirty years, by the Missouri restriction.

“ If Congress could prohibit one species of property, lawful throughout Louisiana when it was acquired, and lawful in the State from whence it was brought, so Congress might exclude any or all property.”

And in concluding the opinion,—“ My opinion is, that the third article of the treaty of 1803, ceding Louisiana to the United States, stands protected by the Constitution, and cannot be repealed by Congress.

“ And, secondly, that the act of 1820, known as the Missouri compromise, violates the most leading feature of the Constitution, a feature on which the Union depends, and which secures to the respective States and their citizens an entire EQUALITY of rights, privileges, and immunities.

“ On these grounds, I hold the compromise act to have been void.”

And although Judge Catron does not allude to those clauses of the Constitution which operate as a bill of rights and as private law, yet it might, from the portion of his opinion before cited, be inferred that he should, in consistency, have agreed with the Chief Justice in holding that slaves are, by them, protected *as property*, in the same degree as domestic animals and inanimate chattels ; that is, if he admits that the guarantees of private rights, in the Constitution, operate in the Territories, which, however, does not appear from his opinion. For he finds the restriction in a clause in the treaty which secured the inhabitants in the “ free enjoyment of their liberty, *property*, and religion.” And this, the Judge supposes, applies to all slaveholders there ; whether they were resident under the former dominion, or are those who have acquired their rights through them, or are immigrants from the States. (See pp. 524, 525.) And it would seem that, in determining what is or is not property in view of the treaty provision, the same criterion should be adopted which, according to the Chief Justice, determines slaves to be property in view of the constitutional guarantee.

§ 499. In the same case Justices McLean and Curtis maintained the power of Congress to prohibit slavery in the Terri-

tories, and, in their dissenting opinions both equally opposed the doctrine that the right of the immigrating slave-holder is protected under the constitutional guarantee of private property and the doctrine that it is maintained in the Territory by the law of the State in which he formerly resided. In their examination the two questions are hardly distinguished as separate inquiries.

§ 500. Mr. Justice McLean's opinion seems to be that Congress has power to abolish or prohibit slavery in the Territories, but has no power to establish or introduce slavery. In denying the latter power, Judge McLean relies on the fact that it is not granted by the Constitution, and is "contrary to its spirit," though appearing to admit that where slavery has before existed or been lawful in a Territory it may thereafter be maintained or recognized by the national Government; and he derives the power of prohibiting it only from his own view of what "sound national policy" may justify, as a "needful rule and regulation" under the "territory and other property" clause. Judge McLean's language, on page 542 of the report is :

"Did Chief Justice Marshall, in saying that Congress governed a Territory, by exercising the combined powers of the Federal and State Governments, refer to unlimited discretion? A Government which can make white men slaves? Surely, such a remark in the argument must have been inadvertently uttered. On the contrary, there is no power in the Constitution by which Congress can make either white or black men slaves. In organizing the Government of a Territory, Congress is limited to means appropriate to the attainment of the constitutional object. No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit; so that, whether the object may be the protection of the persons and property of purchasers of the public lands, or of communities who have been annexed to the Union by conquest or purchase, they are initiatory to the establishment of State Governments, and no more power can be claimed or exercised than is necessary to the attainment of the end. This is the limitation of all the Federal powers.

“ But Congress has no power to regulate the internal concerns of a State, as of a Territory ; consequently, in providing for the Government of a Territory, to some extent, the combined powers of the Federal and State Governments are necessarily exercised.

“ If Congress should deem slaves or free colored persons injurious to the population of a free Territory, as conducing to lessen the value of the public lands, or on any other ground connected with the public interest, they have the power to prohibit them from becoming settlers in it. This can be sustained on the ground of a sound national policy, which is so clearly shown in our history by practical results, that it would seem no considerate individual can question it. And, as regards any unfairness of such a policy to our Southern brethren, as urged in the argument, it is only necessary to say that, with one-fourth of the Federal population of the Union, they have in the slave States a larger extent of fertile territory than is included in the free States ; and it is submitted, if masters of slaves be restricted from bringing them into free territory, that the restriction on the free citizens of non-slaveholding States, by bringing slaves into free territory, is four times greater than that complained of by the South. But, not only so ; some three or four hundred thousand holders of slaves, by bringing them into free territory, impose a restriction on twenty millions of the free States. The repugnancy to slavery would probably prevent fifty or a hundred freemen from settling in a slave Territory, where one slaveholder would be prevented from settling in a free Territory.

“ This remark is made in answer to the argument urged, that a prohibition of slavery in the free Territories is inconsistent with the continuance of the Union. Where a territorial Government is established in a slave Territory, it has uniformly remained in that condition until the people form a State Constitution ; the same course where the Territory is free, both parties acting in good faith, would be attended with satisfactory results.”<sup>1</sup>

<sup>1</sup> Here Judge McLean seems to argue only for a power to prevent the introduction of slaves into territory previously vacant, not for power to change the condition of

In concluding his examination of this point of the case, Judge McLean observes, on page 547, "If Congress may establish a Territorial Government in the exercise of its discretion, it is a clear principle that a court cannot control that discretion. This being the case, I do not see on what ground the act is held to be void. It did not purport to forfeit property, or take it for public purposes. It only prohibited slavery; in doing which it followed the ordinance of 1787." Judge McLean then proceeds to the international question of "the effect of taking slaves into a State or Territory, and so holding them, where slavery is prohibited." Although the argument here assumes that there is no local (internal) law in the Territory maintaining slavery as the condition of domiciled persons, some passages in this part of his opinion are a reply to those doctrines of other members of the Court which would maintain its existence, as between masters and slaves emigrating thither, irrespectively of the legislative (juridical) action of the national Government, and thus make it an effect of the local (internal) law of the Territory.<sup>1</sup> Judge McLean first refers to the principle that slavery exists by local law, or municipal law, in the sense of *jus proprium*, as recognized by the Supreme Court, in *Prigg's case*, 16 Peters, 611, "The state of slavery is deemed to be a mere municipal regu-

persons who, before, had been lawfully held as slaves, and does not consider the act as one *abolishing* slavery. Judge Catron, on the other hand, (p. 525,) says, "The Missouri Compromise line was very aggressive; it declared that slavery was abolished for ever throughout a country reaching from the Mississippi river to the Pacific ocean." &c., and assuming this extent for the country ceded by France, designates the portion in which slavery was prohibited as four-fifths of the whole. The term "aggressive" would be more appropriate on some other theory than that which Judge Catron principally relied on in denying the power of Congress, i. e. the treaty securing the inhabitants in their property, &c. For at the date of cession, and even in 1820, the date of the Act of Congress, there probably was not a single negro slave in the whole region to which it applied.

<sup>1</sup> The relations of persons immigrating into a country or forum are determined by law, which is private international law in the first instance, or while such persons are distinguished as still *domiciled* in their former residence. If the same relations continue, after they have acquired a new domicile, they must be called effects of the local or internal law of the forum. Comp. *ante*, §§ 121, 195, 240. The question, whether the correlative rights and obligations of master and slave immigrating into the Territories may be judicially recognized there, if not prohibited by the legislative enactment of the possessors of sovereign power therein, is to be considered hereafter, in tracing the local municipal laws of the Territories. This question and that of the legislative power of Congress in respect to slavery, seem not to have been clearly distinguished by some of the Justices in their opinions.

lation, founded upon and limited to the range of the territorial laws." He then observes, on page 548 of the report, "By virtue of what law is it that a master may take his slave into free territory, and exact from him the duties of a slave? The law of the Territory does not sanction it. No authority can be claimed under the Constitution of the United States, or any law of Congress. Will it be said that the slave is taken as property, the same as other property which the master may own? To this I answer, that colored persons are made property by the law of the State, and no such power is given to Congress. Does the master carry with him the law of the State from which he removes into the Territory? and does that enable him to coerce his slave in the Territory? Let us test this theory. If this may be done by a master from one slave State, it may be done by a master from every other slave State. This right is supposed to be connected with the person of the master, by virtue of the local law. Is it transferable? May it be negotiated, as a promissory note or bill of exchange? If it be assigned to a man from a free State, may he coerce the slave by virtue of it? What shall this thing be denominated? Is it personal or real property? Or is it an indefinable fragment of sovereignty, which every person carries with him from his late domicil? One thing is certain, that its origin has been very recent, and it is unknown to the laws of any civilized country."

On the same page, Judge McLean also says, "It is said the Territories are common property of the States, and that a man has a right to go there with his property. This is not controverted. But the court say a slave is not property beyond the operation of the local law which makes him such. Never was a truth more authoritatively and justly uttered by man." Judge McLean probably here refers to what was said by the court in *Prigg's* case, above cited.<sup>1</sup>

<sup>1</sup> In this connection, Judge McLean remarks, on the same page, as to the *authority* of that part of the Opinion of the Court, which maintains that slaves are recognized as property by the Constitution: "In this case, a majority of the court have said that a slave may be taken by his master into a Territory of the United States, the same as a horse, or any other kind of property. It is true, this was said by the court, as also many other things which are of no authority. Nothing that has been said by them, which has not a direct bearing on the jurisdiction of the court, against which they de-



§ 501. Mr. Justice Curtis, who in the same case very fully examined the several points involved in the question of the constitutionality of the Missouri Compromise, considers, on pp. 604-619, the preliminary inquiry, or what may be distinguished as being more particularly the question of *public* law, that of the source and extent of the powers of Congress over the Territories, as determinable from the language of the Constitution and from the practice of the Government in its several departments.<sup>1</sup> On page 619, Judge Curtis proceeds to say :

“ It appears, however, from what has taken place at the bar, that notwithstanding the language of the Constitution, and the long line of legislative and executive precedents under it, three different and opposite views are taken of the power of Congress respecting slavery in the Territories.

“ One is, that though Congress can make a regulation prohibiting slavery in a Territory, they cannot make a regulation allowing it ; another is, that it can neither be established nor prohibited by Congress, but that the people of a Territory, when organized by Congress, can establish or prohibit slavery ; while the third is, that the Constitution itself secures to every citizen who holds slaves, under the laws of any State, the indefeasible right to carry them into any Territory, and there hold them as property.

“ No particular clause of the Constitution has been referred to at the bar in support of either of these views. The first seems to be rested upon general considerations concerning the social and moral evils of slavery, its relations to republican Governments, its inconsistency with the Declaration of Independence and with natural right.

cided, can be considered as authority. I shall certainly not regard it as such. The question of jurisdiction, being before the court, was decided by them authoritatively, but nothing beyond that question. A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man, and he is destined to an endless existence.” Here, as is common in these questions, the judge determines whether natural persons may or may not be property according to his individual sense of natural right, without seeming to recognize any exterior judicial criterion. It seems that, of the six Justices who declared the Act of Congress to be unconstitutional, only four, or perhaps only three, held that slaves are recognized by the national jurisprudence as ordinary property.

<sup>1</sup> This practice is hereinafter to be described in the history of the local law of the several Territories and States formed in them.

“ The second is drawn from considerations equally general, concerning the right of self-government, and the nature of the political institutions which have been established by the people of the United States.

“ While the third is said to rest upon the equal right of all citizens to go with their property upon the public domain, and the inequality of a regulation which would admit the property of some and exclude the property of other citizens ; and, inasmuch as slaves are chiefly held by citizens of those particular States where slavery is established, it is insisted that a regulation excluding slavery from a Territory operates, practically, to make an unjust discrimination between citizens of different States, in respect to their use and enjoyment of the territory of the United States.

“ With the weight of either of these considerations, when presented to Congress to influence its action, this court has no concern. One or the other may be justly entitled to guide or control the legislative judgment upon what is a needful regulation. The question here is, whether they are sufficient to authorize this court to insert into this clause of the Constitution an exception of the exclusion or allowance of slavery, not found therein, nor in any other part of that instrument. To ingraft on any instrument a substantive exception not found in it, must be admitted to be a matter attended with great difficulty. And the difficulty increases with the importance of the instrument and the magnitude and complexity of the interests involved in its construction. To allow this to be done with the Constitution, upon reasons purely political, renders its judicial interpretation impossible—because judicial tribunals, as such, cannot decide upon political considerations. Political reasons have not the requisite certainty to afford rules of juridical interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution ; we are under the government of indi-

vidual men, who, for the time being, have power to declare what the Constitution is, according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican Government, with limited and defined powers, we have a Government which is merely an exponent of the will of Congress ; or what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this court.

“ If it can be shown, by any thing in the Constitution itself, that when it confers on Congress the power to make *all* needful rules and regulations respecting the territory belonging to the United States, the exclusion or the allowance of slavery was excepted ; or if any thing in the history of this provision tends to show that such an exception was intended, by those who framed and adopted the Constitution to be introduced into it, I hold it to be my duty carefully to consider, and to allow just weight to such considerations in interpreting the positive text of the Constitution. But where the Constitution has said *all* needful rules and regulations, I must find something more than theoretical reasoning to induce me to say it did not mean all.

“ There have been eminent instances in this court closely analogous to this one, in which such an attempt to introduce an exception, not found in the Constitution itself, has failed of success.”

After referring to settled constructions of the grant to Congress of power of exclusive legislation in all cases whatsoever within the District of Columbia, and power to regulate commerce with foreign nations,—Judge Curtis, on page 623, proceeds to say :

“ While the regulation is one ‘ respecting the territory,’ while it is, in the judgment of Congress, ‘ a needful regulation,’ and is thus completely within the words of the grant, while no other clause of the Constitution can be shown, which requires the insertion of an exception respecting slavery, and while the practical construction for a period of upwards of fifty years forbids such an exception, it would, in my opinion, violate every sound rule of interpretation to force that exception into the Constitution upon

the strength of abstract political reasoning, which we are bound to believe the people of the United States thought insufficient to induce them to limit the power of Congress, because what they have said contains no such limitation.

“ Before I proceed further to notice some other grounds of supposed objection to this power of Congress, I desire to say, that if it were not for my anxiety to insist upon what I deem a correct exposition of the Constitution, if I looked only to the purposes of the argument, the source of the power of Congress asserted in the opinion of the majority of the court would answer those purposes equally well. For they admit that Congress has power to organize and govern the Territories until they arrive at a suitable condition for admission to the Union ; they admit, also, that the kind of Government which shall thus exist should be regulated by the condition and wants of each Territory, and that it is necessarily committed to the discretion of Congress to enact such laws for that purpose as that discretion may dictate ; and no limit to that discretion has been shown, or even suggested, save those positive prohibitions to legislate, which are found in the Constitution.

“ I confess myself unable to perceive any difference whatever between my own opinion of the general extent of the power of Congress and the opinion of the majority of the court, save that I consider it derivable from the express language of the Constitution, while they hold it to be silently implied from the power to acquire territory. Looking at the power of Congress over the Territories as of the extent just described, what positive prohibition exists in the Constitution, which restrained Congress from enacting a law in 1820 to prohibit slavery north of thirty-six degrees thirty minutes north latitude ?

“ The only one suggested is that clause in the fifth article of the amendments of the Constitution which declares that no person shall be deprived of his life, liberty, or property, without due process of law. I will now proceed to examine the question, whether this clause is entitled to the effect thus attributed to it. It is necessary, first, to have a clear view of the nature and incidents of that particular species of property which is now in question.

“Slavery, being contrary to natural right, is created only by municipal law. This is not only plain in itself, and agreed by all writers on the subject, but is inferable from the Constitution, and has been explicitly declared by this court. The Constitution refers to slaves as ‘persons held to service in one State, under the laws thereof.’ Nothing can more clearly describe a *status* created by municipal law. In *Prigg v. Pennsylvania*, (16 Pet. 611,) this court said: ‘The state of slavery is deemed to be a mere municipal regulation, founded on and limited to the range of territorial laws.’ In *Rankin v. Lydia*, (2 Marsh. 12, 470,) the Supreme Court of Appeals of Kentucky, said: ‘Slavery is sanctioned by the laws of this State, and the right to hold them under our municipal regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature or the unwritten common law.’ I am not acquainted with any case or writer questioning the correctness of this doctrine. (See also 1 Burge, Col. and For. Laws, 738–741, where the authorities are collected.)

“The *status* of slavery is not necessarily always attended with the same powers on the part of the master. The master is subject to the supreme power of the State, whose will controls his action towards his slave, and this control must be defined and regulated by the municipal law. In one State, as at one period of the Roman law, it may put the life of the slave into the hand of the master; others, as those of the United States, which tolerate slavery, may treat the slave as a person, when the master takes his life; while in others, the law may recognize a right of the slave to be protected from cruel treatment. In other words, the *status* of slavery embraces every condition, from that in which the slave is known to the law simply as a chattel, with no civil rights, to that in which he is recognized as a person for all purposes, save the compulsory power of directing and receiving the fruits of his labor. Which of these conditions shall attend the *status* of slavery, must depend on the municipal law which creates and upholds it.

“And not only must the *status* of slavery be created and measured by municipal law, but the rights, powers, and obliga-

tions, which grow out of that *status*, must be defined, protected, and enforced, by such laws. The liability of the master for the torts and crimes of his slave, and of third persons for assaulting or injuring, or harboring or kidnapping him, the forms and modes of emancipation and sale, their subjection to the debts of the master, succession by death of the master, suits for freedom, the capacity of the slave to be party to a suit, or to be a witness, with such police regulations as have existed in all civilized States where slavery has been tolerated, are among the subjects upon which municipal legislation becomes necessary when slavery is introduced.

“Is it conceivable that the Constitution has conferred the right on every citizen to become a resident on the Territory of the United States with his slaves, and there to hold them as such, but has neither made nor provided for any municipal regulations which are essential to the existence of slavery ?

“Is it not more rational to conclude that they who framed and adopted the Constitution were aware that persons held to service under the laws of a State are property only to the extent and under the conditions fixed by those laws ; that they must cease to be available as property, when their owners voluntarily place them permanently within another jurisdiction, where no municipal laws on the subject of slavery exist ; and that, being aware of these principles, and having said nothing to interfere with or displace them, or to compel Congress to legislate in any particular manner on the subject, and having empowered Congress to make all needful rules and regulations respecting the territory of the United States, it was their intention to leave to the discretion of Congress what regulations, if any, should be made concerning slavery therein ? Moreover, if the right exists, what are its limits, and what are its conditions ? If citizens of the United States have the right to take their slaves to a Territory, and hold them there as slaves, without regard to the laws of the Territory, I suppose this right is not to be restricted to the citizens of slaveholding States. A citizen of a State which does not tolerate slavery can hardly be denied the power of doing the same thing. And what law of slavery does either take with

him to the Territory? If it be said to be those laws respecting slavery which existed in the particular State from which each slave last came, what an anomaly is this? Where else can we find, under the law of any civilized country, the power to introduce and permanently continue diverse systems of foreign municipal law, for holding persons in slavery? I say, not merely to introduce, but permanently to continue, these anomalies. For the offspring of the female must be governed by the foreign municipal laws to which the mother was subject; and when any slave is sold or passes by succession on the death of the owner, there must pass with him, by a species of subrogation, and as a kind of unknown *jus in re*, the foreign municipal laws which constituted, regulated, and preserved the *status* of the slave before his exportation. Whatever theoretical importance may be now supposed to belong to the maintenance of such a right, I feel a perfect conviction that it would, if ever tried, prove to be as impracticable in fact, as it is, in my judgment, monstrous in theory.

“I consider the assumption which lies at the basis of this theory to be unsound; not in its just sense, and when properly understood, but in the sense which has been attached to it. That assumption is, that the territory ceded by France was acquired for the equal benefit of all the citizens of the United States. I agree to the position. But it was acquired for their benefit in their collective, not their individual, capacities. It was acquired for their benefit, as an organized political society, subsisting as ‘the people of the United States,’ under the Constitution of the United States; to be administered justly and impartially, and as nearly as possible for the equal benefit of every individual citizen, according to the best judgment and discretion of the Congress; to whose power, as the Legislature of the nation which acquired it, the people of the United States have committed its administration. Whatever individual claims may be founded on local circumstances, or sectional differences of condition, cannot, in my opinion, be recognized in this court, without arrogating to the judicial branch of the Government powers not committed to it; and which, with all the unaffected respect I feel for it, when acting in its proper sphere, I do not think it fitted to wield.



“ Nor, in my judgment, will the position, that a prohibition to bring slaves into a Territory deprives any one of his property without due process of law, bear examination.

“ It must be remembered that this restriction on the legislative power is not peculiar to the Constitution of the United States ; it was borrowed from *Magna Charta* ; was brought to America by our ancestors, as part of their inherited liberties, and has existed in all the States, usually in the very words of the great charter. It existed in every political community in America in 1787, when the ordinance prohibiting slavery north and west of the Ohio was passed.

“ And if a prohibition of slavery in a Territory in 1820 violated this principle of *Magna Charta*, the ordinance of 1787 also violated it ; and what power had, I do not say the Congress of the Confederation alone, but the Legislature of Virginia, or the Legislature of any or all the States of the Confederacy, to consent to such a violation ? The people of the States had conferred no such power. I think I may at least say, if the Congress did then violate *Magna Charta* by the ordinance, no one discovered that violation. Besides, if the prohibition upon all persons, citizens as well as others, to bring slaves into a Territory, and a declaration that if brought they shall be free, deprives citizens of their property without due process of law, what shall we say of the legislation of many of the slave-holding States which have enacted the same prohibition ? As early as October, 1778, a law passed in Virginia, that thereafter no slave should be imported into that Commonwealth by sea or by land, and that every slave who should be imported should become free. A citizen of Virginia purchased, in Maryland, a slave who belonged to another citizen of Virginia, and removed with the slave to Virginia. The slave sued for her freedom, and recovered it ; as may be seen in *Wilson v. Isabel*, (5 Call's R. 425.) See also *Hunter v. Hulsher*, (1 Leigh, 172 ; ) and a similar law has been recognized as valid in Maryland, in *Stewart v. Oaks*, (5 Har. and John. 107.) I am not aware that such laws, though they exist in many States, were ever supposed to be in conflict with the principle of *Magna Charta* incorporated into the State Constitutions. It was cer-

tainly understood by the Convention which framed the Constitution, and has been so understood ever since, that, under the power to regulate commerce, Congress could prohibit the importation of slaves ; and the exercise of the power was restrained till 1808. A citizen of the United States owns slaves in Cuba, and brings them to the United States, where they are set free by the legislation of Congress. Does this legislation deprive him of his property without due process of law ? If so, what becomes of the laws prohibiting the slave trade ? If not, how can a similar regulation respecting a Territory violate the fifth amendment of the Constitution ? ”

§ 502. The proposition, that the several States of the Union, or their citizens, are equally entitled to the use and benefit of the territory belonging to the United States ; that the maintenance of slavery in every part of such territory is essential to enable the slave-holding States, or their citizens, to enjoy equally with the non-slaveholding States, or their citizens, that use and benefit of the territory ; and that, therefore, Congress had no *power* to abolish or prohibit slavery in the Louisiana Territory is, as maintained by some of the Justices in this case, a judicial or legal rule, or a rule of *law*, one by which the rights and obligations of natural persons may be coercively maintained and judicially determined. And it is equally so whether the right which is asserted by the denial of the power is one vested in the individual citizens of the slave-holding States, or one vested in the slaveholding States as political persons ; that is, whether the principle is applied as public or as private law.<sup>1</sup> For in either case the obligations which are enforced, as correlative to the right which is maintained, are obligations of private persons.

§ 503. As such judicial or juridical rule, the proposition should be distinguished from one which may be expressed in very similar terms. This is, that the several States, or their citizens, are equally entitled to the use and benefit of the territory belonging to the United States ; that the powers held by the national Government in respect to this territory are held under the obligation or trust of securing to the several States, or their

<sup>1</sup> *Ante*, § 25.

citizens, this equality ; that the maintenance of slavery in every part of such territory is essential to enable the slave-holding States, or their citizens, to enjoy equally with the non-slave-holding States, or their citizens, that use and benefit of the territory ; and that, therefore, Congress has no *right* to abolish or prohibit slavery in any of the Territories.

For whether the States, as political persons, or the individual citizens of the several States are the persons thus supposed to be equally entitled to the use and benefit of the territory, this proposition is only a political rule ; or, negatively, it is not asserted as a rule of *law*, or one by which the rights and obligations of private persons are coercively maintained and judicially determined. The obligation, correlative to the right asserted, is one on the part of the Government as a political agent, and beyond the reach of the judiciary, which is a part of the same Government.

§ 504. It may be doubted whether a majority of those members of Congress, or persons in other spheres of public action, who have contended against the legislative prohibition of slavery in the Territories, have maintained the above proposition as a rule of law judicially applicable, or as being other than a political principle. The late Mr. Calhoun, who is well known to have insisted on the strictest construction of all powers of the national Government, when the question was of their exercise for the restriction of slavery, may on many occasions have advocated propositions which, as now read, may be understood to assert the doctrine as a rule of public law and one judicially cognizable.<sup>1</sup>

<sup>1</sup> See Calhoun's Works, IV., 339-349, the resolutions presented by him in the Senate of the U. S., Feb. 19, 1847, and Mr. Calhoun's remarks on that occasion. Ibid. 535-541, Remarks on the proposition to establish territorial Governments in New Mexico and California, Feb. 24, 1849. Ibid. 562-565, in his speech, March 4, 1850, where Mr. Calhoun asserts to the fullest extent the power of Congress over slavery in the Territories, while claiming, as a constitutional right, its exercise in sustaining slavery. Compare remarks on Mr. Calhoun's position in this question and on the distinction of the doctrine, as a political rule or as a legal one, in the review of Dred Scott's case, in Monthly Law Reporter, April, 1857, p. 35. The resolutions of Feb. 1847, were as follows :

" *Resolved*, That the Territories of the United States belong to the several States composing this Union, and are held by them as their joint and common property.

" *Resolved*, That Congress, as the joint agent and representative of the States of this Union, has no right to make any law, or do any act whatever, that shall directly, or by its effects, make any discrimination between the States of this Union, by which

But Mr. Calhoun appears to have asserted the doctrine as a political rule only. Such an interpretation of his language would not be inconsistent with the doctrine of private law which he is believed to have held, that slavery is legal, or judicially cognizable, in all territory belonging to the United States, independently of positive legislation ; that is, even when no statute has been enacted on the subject by the possessors of sovereign power in and for the territory, (whoever they may be,) and that it will continue to be lawful there, until prohibited by such statute.<sup>1</sup> This question, which is purely one of positive law, that is, of law applicable by judicial tribunals, is to be examined in a later portion of this treatise.

§ 505. On page 448 of the report, Chief Justice Taney says of the powers of the Government in this respect, "Whatever it acquires it acquires for the benefit of the people of the several States who created it. It is their trustee acting for them, and charged with the duty of promoting the interest of the whole people of the Union in the exercise of the powers specifically granted." And on the same page, "it [the Territory] was acquired by the General Government as the representative and trustee of the people of the United States, and it must, therefore, be held in that character for their common and equal benefit, for it was the people of the several States, acting through their agent and representative, the Federal Government, who, in fact, acquired the Territory in question, and the Government holds it

any of them shall be deprived of its full and equal right in any territory of the United States, acquired or to be acquired.

*Resolved*, That the enactment of any law, which should directly, or by its effects, deprive the citizens of any of the States of this Union from immigrating, with their property, into any of the territories of the United States, will make such discrimination, and would, therefore, be a violation of the Constitution and the rights of the States from which such citizens emigrated, and in derogation of that perfect equality which belongs to them as members of this Union, and would tend directly to subvert the Union itself.

"*Resolved*, That it is a fundamental principle in our political creed, that a people in forming a Constitution have the unconditional right to form and adopt the government which they may think best calculated to secure their liberty, prosperity, and happiness; and that, in conformity thereto, no other condition is imposed by the Federal Constitution on a State in order to be admitted into this Union, except that its constitution shall be republican, and that the imposition of any other by Congress would not only be in violation of the Constitution, but in direct conflict with the principle upon which our political system rests."

<sup>1</sup> *Ante*, p. 423, note.

for their common use until it shall be associated with the other States as a member of the Union."

But it would appear that so far as this doctrine of the equality of the States or of the people of the States in respect to the use and benefit of the Territory was recognized by the Chief Justice, and by Justices Wayne and Grier affirming the opinion of the court, that they agreed with Justices McLean and Curtis, in considering it as a political principle only ; a rule to govern Congress in the exercise of the power of determining all rights and obligations of private persons in the Territory *where not limited* by provisions in the Constitution of the nature of *a bill of rights* operating as private law. As to the extent of the guarantee of private property in this part of the Constitution, there was a difference of opinion ; but no one of these members of the Court appears to have taken the principle either as a rule determining the location of juridical power, in respect to the status or condition of private persons, or as one which could in itself enable judicial tribunals to determine any rights or obligations of private persons.

Justices Daniel, Campbell, and Catron, on the contrary, all, with more or less consistency, recognize the proposition as a juridical rule, one by which the status of persons in the Territories may be judicially determined.

Judge Daniel, on page 489 of the report, (*ante*, p. 532,) regards the right asserted, in denying the power of Congress, as one belonging to the individual citizens of the slave-holding States as those who, with the individual citizens of the non-slaveholding States, are equally entitled to whatever use or benefit private persons may have of the territory. Judge Daniel therefore applies the rule as private law.

Judge Campbell, on the other hand, regards the right thus vindicated as one belonging to the States in their political personality ; or, taking the principle as a rule of public law, holds that the rights and obligations of natural persons residing in the Territories, which are incident to personal condition or status, are not dependent on the national powers or those vested in the federal Government, but depend upon the juridical will of some

other possessors of sovereign power, for whom that Government is, in the Territory, only the agent or trustee.

Judge Catron also spoke of the right vindicated against the power of Congress as the right of the States, asserting that the slave-holder's right is protected in virtue of the equality of his State, (p. 527 of the report, *ante*, p. 540.) At the same time Judge Catron seems to rely on the protective effect of the treaty with France as creating an exception to the ordinary powers of Congress in respect to status of persons in the Territory, and to recognize Congress as the only possessor of juridical power in such Territory.

§ 506. The opinions of the several justices in Dred Scott's case, on the question of the constitutionality of the act of Congress of 1820 in prohibiting slavery, have been here cited under the general inquiry whether State legislatures, or (assuming that the national Government has in the Territories the powers ordinarily held by a State Government) Congress legislating for the Territories, &c., has the power to prohibit or abolish negro slavery.<sup>1</sup>

It appears that of the six members of the Court who denied the constitutionality of the Act, four based that denial on the ground that slaves are property, in view of the Constitution operating as a bill of rights, and that the act of Congress was an infringement of that guarantee.

Of these members of the Court, Chief Justice Taney, and Justices Wayne and Grier adopting the opinion written by the Chief Justice, held that slaves are property by the national law, because rights of property in respect to them are specially recognized in the written Constitution, and also because slaves are property by common law, or an unwritten jurisprudence embraced in the national jurisprudence, independently of any specific recognition of slavery in the written Constitution.

Mr. Justice Daniel, in maintaining the protection of slavery in the Territories under the constitutional guarantee of private property, appears to have relied solely on the clauses of the written

<sup>1</sup> *Ante*, §§ 488, 489.

Constitution referring to slaves, as containing the recognition of slaves, as property, by the national law.

Mr. Justice Campbell denied the power of Congress on the ground that the relation of master and slave in the Territories depends upon some other possessor of legislative or juridical power. And Judge Daniel seems to have been with Judge Campbell in this doctrine, to some extent.

Mr. Justice Catron's assertion of the exclusive power of Congress in reference to the Territory and his distinct reliance on the treaty of cession, as limiting the power in respect to Louisiana, prevent the inference that he agreed in either of the doctrines above stated ; however much his language, in some parts of his opinion, may accord with one or the other.

Three distinct grounds of denying the power of Congress were therefore relied on in this case ; but no one of these was supported by more than four of the nine members of the Court.<sup>1</sup>

Independently of the question whether the opinion on the constitutionality of the act of Congress was extrajudicial, if it is the reason of a decision, or the ground on which it is made, which is authoritative,<sup>2</sup> this diversity of opinion, as to the governing prin-

<sup>1</sup> In case of a majority of votes in Kansas Territory for *Constitution with no slavery*, the (Lecompton) constitution to be adopted for the State by that vote under the organic law contained this clause : "no slavery shall exist in the State of Kansas, except that the right of property in slaves now in the Territory shall in no manner be interfered with." Alluding to this, President Buchanan, in his message, Dec. 8th, 1857, observes, "These slaves were brought into the Territory under the Constitution of the United States, and are now the property of their masters. This point has at length been finally decided by the highest judicial tribunal of the country, and upon this plain principle, that when a confederacy of sovereign States acquire a new territory at their joint expense, both equality and justice demand that the citizens of one and all of them have the right to take into it whatever is recognized as property by the common constitution."

The decision in Dred Scott's case was, that slavery had always been sanctioned in that Territory by the local law ; Congress having had no power to alter the local law in that respect. From the President's reference to the case, it would be thought that the court had decided that slaves carried into any Territory of the U. S. are slaves still. That doctrine may be a necessary conclusion from a denial of the power in Congress on the ground that slaves are "property by the common constitution," or on the ground that the equality of the States or their citizens in the use and benefit of the Territories forbids the abolition of slavery. But neither of these two grounds was maintained by a majority of the Court. They are entirely distinct, and though some passages in Judge Catron's opinion are very similar in language, no member of the Court connected the two doctrines as the President has done in this instance.

<sup>2</sup> Ram on Legal Judgment, pp. 19-28.



ciple, should be taken into account in estimating the legal force of the decision.

§ 507. It has frequently been asserted that in and by those clauses in the Constitution which recognize some persons as not being free by the laws of the States wherein they are found, or from which they may have escaped,<sup>1</sup> the rights of other persons, in respect to them, under the State law, are thereby maintained by the national law as rights in respect to *property* as distinguished from persons.

The process of reasoning which should support such a conclusion has not been stated in asserting the proposition. It may be supposed to resemble the following. The Constitution here recognizes rights in respect to natural persons which exist under a State law. The Constitution and the State law recognize here a right in respect to the same object.<sup>2</sup> By the State law these natural persons *may be* property, and not legal persons. Now if the State law recognizes the object of the right as property or a chattel, the Constitution in recognizing the same object of the right, must recognize the natural person as that object which the State law recognizes; but that is a chattel or property. Therefore,—conclusion, that the Constitution recognizes the object of the right as a chattel, and, in saying *persons*, means *property* as distinguished from persons. The argument rests on the fallacy that it is impossible for one juridical person to recognize a right, in respect to a natural person as its object, which is created by another juridical person, without recognizing him as a chattel, if so considered by that other.

<sup>1</sup> The Constitution contains these clauses. Art. I. sec. 2. "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons."

Sec. 9. "The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person."

Art. IV. sec. 2. "No person held to service or labor in one State, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

<sup>2</sup> *Ante*, § 24.

§ 508. In the proposition above noticed, it is merely asserted that the slave is recognized, by the national juridical authority, as property, while he is subject to some State law, either as being within its territory, or a fugitive from it.<sup>1</sup> It may be doubted whether, before this opinion of the Chief Justice, supported by Justices Wayne, Grier, and Daniel, it has ever been maintained by any persons, that not only, *by these clauses*, are slaves recognized as property within the State jurisdiction and when fugitive, but also, *in these clauses*, they are, by the juridical action of the nation, recognized as property throughout the entire dominion of the United States. No argument has been put forth as leading to such a conclusion. It seems to be founded on an assumption that there is no distinction between rights supported by a law of national *authority* and rights supported by law having national *extent*; that if the national authority supports the master's right, in any case, as a right of property, the national law supports it as a right of property everywhere. The doctrine requires, apparently, the admission of two fallacies.

This question of the proper interpretation of these clauses of the Constitution, or whether, in them, slaves are recognized as persons or as property, will be more fully considered in another portion of this treatise as a question of the *quasi*-international law of the United States, or that law which is national in its authority and international in its effect as between the States, and by the character of the persons whose rights and obligations it determines.

§ 509. But in the first part of the extract from the opinion delivered by the Chief Justice, the broader ground seems to be relied on that the slave-holder's right comes within the guarantee, because there is no "difference between property in a slave and

<sup>1</sup> So even Judge Story, in *Prigg's case*, 16 Peters, 618, holding that by the operation of the constitutional provision the fugitive slave was still in the same condition he had been in, in the State from which he had escaped, and, therefore, might be seized by his owner and carried back without public authority notwithstanding it was declared in the same provision that the fugitive *person* should be *delivered up on claim*, and Judge Baldwin, in *Groves v. Slaughter*, 15 Peters, 515, holding that slaves "being property, by the law of any State, the owners are protected from any violation of the rights of property by Congress under the fifth Amendment of the Constitution," only claim that while their condition is determined by *State* authority to be property, the national Government must also recognize them as property.

other property ;" or, perhaps, the doctrine held may be thus expressed : that there is no distinction in law, or in the jurisprudence which may be applied by the national judiciary, between rights of *property in respect to slaves*, and, rights in respect to *slaves as property*.

§ 510. In any inquiry into the extent of terms used in the definition of chartered rights, (i. e., rights which have long been secured by written charters or bills of rights,) it is to be noticed that whether the judicial function is relatively superior, or co-ordinate, or subordinate, the practice of the legislating bodies, whose power in this respect is to be ascertained, and that of their actual predecessors, is the admitted ordinary exponent of the rule which is to determine the question. For, since in the very great majority of instances the action of the judiciary follows that of the legislature, if any conflict should arise as to the extent of the legislative function, a public customary law known by the continued, before-undisputed exercise of the legislative power, is all that can be appealed to.

Now the legislative exposition of the law, which is given in asserting legislative power to create, modify, or terminate the right of ownership in respect to natural persons has, in the history of the world, been constant, concurrent, and continued, from the "time whereof the memory of man runneth not to the contrary ;" and the same power, as exercised solely with reference to the slavery of negroes, Indians, and others not of Caucasian or European race, has been illustrated in the legislative history of the British empire and of the colonies, as presented in the former part of this work, in the claims of the revolting colonies against parliament,<sup>1</sup> and in the history of local law in all the States, both those wherein negro slavery has been abolished and those wherein it has continued. As will be more particularly shown hereafter in that connection, the entire power over slavery of persons not of European or white race, to establish, modify, or abolish it, has in most of the States been assumed by the constituted legislatures, without question from the judiciary ; unless specific provisions limiting the legislature in this

<sup>1</sup> *Ante*, p. 225, note 4.

respect have, as in some of the southern States, been introduced into the written Constitution. It appears never to have been judicially doubted, before this decision, that the entire power over the subject was in the constituted legislatures; in that of the State Governments for the States, and in Congress for the Territories, &c., unrestrained by common law or by bills of rights. And, until the Act of Congress of May 30, 1854, popularly known as the Act repealing the Missouri Compromise,<sup>2</sup> the power had been exercised without question by Congress legislating for the Territories.

§ 511. The Chief Justice, in that part of the Opinion which has been referred to, notices the fact that "the laws and usages of nations and the writings of eminent jurists upon the relation of master and slave, and their mutual rights and duties and the powers which governments may exercise over it, have been

<sup>2</sup> Entitled, *An Act to organize the Territories of Nebraska and Kansas*. In sec. 14, it is provided, "That the Constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said Territory of Nebraska as elsewhere within the United States; except the eighth section of the act preparatory to the admission of Missouri into the Union, approved March sixth, eighteen hundred and twenty, which being inconsistent with the principle of non-intervention by Congress with slavery in the States and Territories, as recognized by the legislation of eighteen hundred and fifty, commonly called the Compromise Measures, is hereby declared inoperative and void; it being the true intent and meaning of this act not to legislate slavery into any Territory or State, nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States, *Provided*, that nothing herein contained shall be construed to revive or put in force any law or regulation which may have existed prior to the act of 6th March, eighteen hundred and twenty, either protecting, establishing, prohibiting, or abolishing slavery." Sec. 32, applies the same words to Kansas. The acts of 1850, referred to here, are not particularized. Those popularly known as the Compromise Measures, are laws 31st Congress, ch. 47, entitled *An Act proposing to the State of Texas the Establishment of her Northern and Western Boundaries, the Relinquishment by the said State of all Territory claimed by her exterior to said Boundaries, and of all her claims upon the United States, and to establish a Territorial Government for New Mexico*. Sec. 2, of this act provides, "That, when admitted as a State, the said Territory, [of New Mexico.] or any portion of the same, shall be received into the Union, with or without slavery as their constitution may prescribe at the time of their admission." Also, ch. 50, *An Act for the Admission of the State of California into the Union*; ch. 51, *An Act to establish a Territorial Government for Utah*; in neither of which last is any thing said about slavery; ch. 60, The fugitive slave law, and ch. 63, *An Act to suppress the Slave Trade in the District of Columbia*.

The act of Mar. 6, 1820, was entitled, for the admission of Missouri and "*to prohibit slavery in certain territories*." Sec. 8, provided, "That in all that territory ceded by France to the United States, under the name of Louisiana, which lies north of thirty-six degrees and thirty minutes north latitude, not included within the limits of the State contemplated by this act, slavery and involuntary servitude, otherwise than in the punishment of crimes whereof the parties shall have been duly convicted, shall be and is hereby for ever prohibited."

dwelt upon in the argument" of this case, as determining whether, as was urged or supposed on one side, "there is a difference between property in a slave and in other property, and that different rules may be applied to it in expounding the Constitution of the United States."

If the term "law of nations," is here taken in the sense usually given to it in English and American jurisprudence,<sup>1</sup> the sense of public international law, a law of imperfect obligation, acting on states or nations as its subjects, the very definition of that law maintains the declaration of the Chief Justice, "that there is no law of nations standing between the people of the United States and their Government and interfering with their relation to each other." So, too, it must be admitted by all who recognize the Constitution as the supreme public law, that "the powers of the Government and the rights of the citizen under it are positive and practical regulations plainly written down. The people of the United States have delegated to it certain enumerated powers, and forbidden it to exercise others. It has no power over the person or property of a citizen but what the citizens of the United States have granted." It follows also, from the recognition of the constituting people of the United States as a sovereign, that "no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government or take from the citizens the rights they have reserved." These propositions seem to be unquestioned. As Mr. Justice Catron says, on page 519 of the report, "That Congress has no authority to pass laws and bind men's rights beyond the powers conferred by the Constitution is not open to controversy."

§ 512. But when the question before a judicial tribunal is, as it was stated by the Chief Justice, on page 444 of the report, "what power Congress can constitutionally exercise in a Territory over the rights of persons or rights of property of a citizen;" or, when, as said by Mr. Justice Catron, on page 519, "it is insisted that, by the Constitution, Congress has power to legis-

<sup>1</sup> Compare *ante*, § 146.

late for and govern the Territories of the United States, and that by force of the power to govern, laws could be enacted, prohibiting slavery in any portion of the Louisiana Territory, and, of course, to abolish slavery *in all* parts of it, whilst it was, or is, governed as a Territory ;” and when the tribunal refers to those provisions of the Constitution which are in the nature of a bill of rights, or operate as private law in securing rights to private persons throughout the whole dominion of the people of the United States, as against the constituted Government, and designates the clause declaring that no person shall be deprived of *property* without due process of law, as securing a particular right in controversy ; it is to be presumed, (and in direct proportion with the respect due to the court is the strength of the presumption,) that the judge will conceive of property according to some standard, criterion, or definition known to, and customarily accepted by, the possessors of sovereign power whose will he is to apply as law ; that the standard of property will not be merely such as he himself conceives to be proper, expedient, morally or politically desirable, or conformable to the law of nature, simply as he conceives it to be.<sup>1</sup>

If there is no written or statute law, derived from this possessor of sovereign power, whose will and whose will alone the tribunal can enforce, which declares what is or is not property, the definition must be found in an unwritten or customary law which has been maintained by that possessor of sovereign power.

§ 513. There may be cases, coming before the national judiciary in its application of the *quasi*-international law, in which rights and obligations are to be determined according to the law of one of the several States or a local municipal law ; though

<sup>1</sup> *Wynehamer agt. the People*, (a case under the prohibitory liquor law,) 3 Kernan 385 ; Comstock, J., “The foundation of property is not in philosophic or scientific speculations, nor even in suggestions of benevolence and philanthropy. It is a simple and intelligible proposition, admitting in the nature of the case no qualification, that that is property which the law of the land recognizes as such. It is, in short, an institution of law, and not a result of speculation in science, in morals, or economy.” And so in determining this question of property in negroes, it is equally immaterial whether negroes *naturally* are and *ought*, legally, to be held equal to whites, or whether they *naturally* are and *ought*, legally, to be held inferior creatures, and, as domestic animals, merely instruments in the possession of legal persons.

they are to be enforced or maintained by the national authority.<sup>1</sup> But in the case before the court, the question was not of a standard of property accordant with the juridical will of some one State, or with that of any number of the several States.<sup>2</sup> The question was, indeed, one of a local municipal law, the law prevailing in one of the Territories, but a law derived from the juridical will of the nation, the integral people of the United States.

There was no written or statutory enactment, proceeding from that integral people, which defined property, nor any distinguishing between legal persons and legal things, much less any declaring that natural persons held in servitude are or may be *property* in the juridical sentiment of that integral people. The standard or criterion of property was, therefore, only to be found in unwritten or customary law, identified with the law-giving authority of the nation, the constituting people of the United States.<sup>3</sup>

§ 514. Now although it may be admitted that there is no separate, distinct rule of action, derived only from precedent and custom, which has territorial extent within the entire domain of the United States as one nation ; that the law of the United States is found in the written Constitution and the acts of Congress passed in pursuance of it ; that, in civil cases, the national judiciary applies common law as the rule obtaining within some one State or several jurisdiction of the United States, and has no common law to apply in the exercise of its criminal juris-

<sup>1</sup> *Ante*, §§ 368, 429.

<sup>2</sup> According to Mr Justice Campbell's view it is always the Constitution or law of some one State of the Union which in any place within the United States furnishes the legal criterion of what is or is not property, and "what these Constitutions and laws validly determine to be property, it is the duty of the Federal Government, through the domain of jurisdiction merely Federal, to recognize to be property." (p. 515 of rep.) As then, according to Judge Campbell's theory, there is no integral nation or people of the U. S., there can be no national law determining what is or is not property.

<sup>3</sup> From the whole of the extract from the Opinion, already given, it appears that the Chief Justice also referred to certain clauses in the Constitution as a legislative declaration that slaves are to be considered property. The reasons for excepting to this have already been stated, p. 560. It would be too much like arguing in a circle to cite these clauses as declaring that slaves are to be regarded as property, and, on the other hand, refer to the doctrine that slaves are property, to interpret these clauses.



diction,<sup>1</sup> still it is absolutely impossible, from the nature of positive legislation, that its enactments should be judicially applied without reference to unwritten or customary rules,<sup>2</sup> and the meaning of words in the written Constitution cannot be ascertained without some reference to an unwritten jurisprudence.<sup>3</sup> Even should there be none such particularly identified with the juridical history of that particular possessor of sovereign power whose written law is to be applied, an unwritten jurisprudence is still judicially cognizable, that derived from the juridical history of civilized nations, the *law of nations*, universal jurisprudence ; and hence, “the laws and usages of other nations and the writings and reasoning of statesmen and eminent jurists,” customarily received by the judicial tribunals of other nations, are to be referred to as an exposition of natural reason, superior, for juridical purposes, to the individual opinions of the tribunal, because presumptively accepted by the possessor of sovereign power whose will it proposes to execute.<sup>4</sup>

And that such reference is recognized by the Court, in this case, as legitimate, particularly with reference to a standard of property and in distinguishing between natural persons as being either legal persons or chattels, appears from that portion of the Opinion in which it is held that negroes are not citizens, page 407 of the report ; referring to “the public history of every European nation ;” that the negro “was bought and sold and treated as an ordinary article of merchandise and traffic whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race,” &c.<sup>5</sup>

§ 515. The reference is to the *law of nations* in the sense of universal jurisprudence, the *jus gentium* in that sense in which the term was used by the Roman jurists, a law always presumptively existing in the municipal (national) law of every civilized country.<sup>6</sup> In determining then what is or what is

<sup>1</sup> *Ante*, p. 479–482. *Wheaton v. Peters*, 8 Peters, 591. Curtis' Comm. § 19, and cases noted.

<sup>2</sup> Lieber's *Legal and Political Hermeneutics*, ch ii.

<sup>3</sup> *Ante*, § 428. 1 Kent's Comm. 336.

<sup>4</sup> See *ante*, p. 207, note.

<sup>5</sup> *Ante*, §§ 33, 34, and pp. 200–202.

<sup>6</sup> *Ante*, §§ 94, 95, 100.

not property, as secured against the national Government by the private law of the Constitution, the criterion is a universal jurisprudence, gathered, in the first instance, from the judicial practice of all nations, and, more definitively, those principles which the possessor of sovereign power, for whom the national judiciary acts, has before recognized as universal jurisprudence embraced in its own common, customary, unwritten law, and recognizable especially in that portion which is applied as private and public international law.<sup>1</sup>

§ 516. It being a rule identified with the will of the integral nation, in distinction from any dependent for its authority on the several will of any State or States of the Union, which is to be ascertained,<sup>2</sup> the principles, maxims, or rules affecting states or the condition of private persons, which the national judiciary must thus recognize as universal principles and common law, are to be found only in the history of law having the same *character* and operating with *national extent*, and *quasi-international effect* in the British empire, the revolting colonies and the thereafter succeeding independent States of the American Union ; and, as such, distinguishable from the common law which is historically known to have prevailed in any one or more States of that Union.<sup>3</sup>

§ 517. This law is mutable, as every other rule resting on human authority. And a tribunal determining to-day, what is property by the *law of nations*, is bound to take the *law of nations* of to-day, not that of some previous generation or previous century. It is a rule which depends for its juridical force, or for its acceptance as a judicial rule, not on the opinion of bygone nations and states, however powerful, or however wide their dominion or the fame of their arts, their arms, or their jurisprudence, but on the presently continuing assent of legislating nations. So far as the law of imperial Rome is now the index of the *jus gentium*, it is so not because it is, in itself, reason or natural justice ; but because it has been, and so far only as it has been, continuously accepted by modern civilized

<sup>1</sup> *Ante*, §§ 173, 176, 290.

<sup>2</sup> On this compare *ante*, ch. xii.

<sup>3</sup> Compare *ante*, ch. xiv.

states as *their* index of natural reason.<sup>1</sup> As the *jus gentium* of heathen Rome, making the captive and the child of an enslaved mother, of European or Caucasian race, a property, has been changed in the jurisprudence of Christian nations, so the *law of nations* of the modern world, including the nations colonizing America in the sixteenth, seventeenth, and eighteenth centuries, has changed in respect to negroes held in servitude. Property in negro men as chattels, wherever they are by law chattels or property, rests now only on the local law, the *jus proprium*, common law or statute law, as the case may be, of some one state or possessor of sovereign power over the condition of natural persons; it has no foundation in universal jurisprudence, the common law of the civilized Christian world.

The proof of this has been given in the former part of this volume.

§ 518. And if it should be objected, that in this reference to a *law of nations* or a universal jurisprudence presumptively recognized as a jural rule by the nation or by the people of the United States, the authors of the American Constitution, to determine what is or is not property in view of the constitutional guarantee, not the *law of nations* of to-day, nor yet that of the whole civilized world is the test, but one peculiar to the people of the United States; or, that one recognized among the States at the time of the formation of the Constitution of the United States must be received in that connection; then the history of the law of the colonies and States is to be referred to, not as exhibiting the several or local laws of the States or their political predecessors, but that law which was imperial or national in its *authority*, and intercolonial, national, or *quasi-international* in its *extent* in the British empire and among the States at the period of the formation of the Constitution.

§ 519. The juridical history of the States, as connected with conditions of freedom and its contraries, from the period of separation from Great Britain, (the point of time to which it has been brought in the sixth chapter,) to the date of the formation of the Constitution, is to be given hereafter. It will be

<sup>1</sup> *Ante*, p. 29.

there shown, and indeed it is too well known to be here stated as questionable, that the changes which occurred during that period in the private law of the States, were all such as favored or extended the rights incident to a free condition, and discouraged or removed the disabilities incident to its contraries. But, independently of such changes as modifying the *law of nations* or universal jurisprudence particularly identified with the juridical will of the constituent people of the United States, the international and *quasi*-international laws which prevailed as between the different parts of that empire in which the colonies had been included, to say nothing of the local laws of some districts, do not exhibit a criterion of property in natural persons, as recognized by the political predecessors of that people, different from that afforded during the same period by any more general *law of nations*.

That for many years before the Revolution (whatever may have been the principles sustaining the slavery of a heathen negro imported into any one of the colonies) the condition of an American-born negro held in involuntary servitude, whether chattel slave or bond person, and the correspondent rights of the master or owner rested exclusively on the local law, *jus proprium*, of some one several colony, and were not internationally recognized, in the several parts of the empire, as *effects of universal jurisprudence*, nor as such recognized by the *common law of the nation*, has, it is believed, been demonstrated in the former chapters, which contain the history of conditions of freedom and bondage in the colonies, and of their recognition or non-recognition in the international or *quasi*-international relations of the different portions of the empire.

§ 520. From the above argument it may appear that, in order to determine what is or is not property in view of the constitutional guarantee, it is necessary to discriminate an unwritten jurisprudence or a "common law" which may be judicially identified with the juridical will of the people of the United States, the authors of the written Constitution. And, in view of this circumstance, it seems that the assertion that slaves are property in view of that guarantee, independently of any

specific recognition of them as property in other parts of the instrument, is equivalent to an assertion, that, unless declared unlawful by positive legislation proceeding from the possessors of sovereign power to determine status or personal condition, (possessors known by the Constitution, regarded as evidence of the investiture of any sovereign power,) slavery is a lawful status in every part of the United States, whether a State or a Territory of the United States ; or that (which is only stating the same doctrine under a different form,) when natural persons who, in any other jurisdiction or forum, have been by law in the relation of master and slave appear in any State or Territory of the United States, the right of the master and the correlative obligations of the slave and of all other persons, will continue in such State or Territory by the unwritten or common law prevailing therein, whether such master and slave do or do not acquire a domicil, unless such right and obligations have been prohibited by positive legislative enactment proceeding from the actual possessors of sovereign power to determine status or personal condition. And, it being assumed that the only possessors of sovereign power over status or personal condition, who are known under the Constitution, are either the people of an organized *State* of the Union legislating for such State, or Congress legislating for the Territories, &c., to such extent as may not have been prohibited by the Constitution, the doctrine is, further, (independently of the question whether slavery may be abolished by the power of Congress,) that in all Territory of the United States, now belonging or hereafter to be acquired, not included within the limits of an organized State of the Union, slavery is now and will be lawful under the local law thereof, that is both by the internal and the international law, the law applying to persons whether strangers or having a domicil therein.

§ 521. Although the opinion of Chief Justice Taney, in *Dred Scott's* case, supported by Justices Wayne and Grier, may be the solitary judicial authority sustaining the doctrine above stated, it has, with greater or less openness, been advanced on different occasions, during the twenty or thirty years last past, by persons, occupying stations which entitle their opinions to be

considered, at least, juristical, if not judicial or juridical. But it has never, probably, been so prominently and distinctly asserted as by the Hon. J. P. Benjamin, of Louisiana, in his speech in the Senate of the United States, 11 March, 1858, on the Kansas Bill. And since, in stating what he justly regards as "fundamental" in the argument, the Senator so plainly presents that issue, in view of which this volume may be said to have been principally written, and also since he proposes to maintain his doctrine by that mode of reasoning which has herein before been used as legitimate, i. e., by an appeal to the history of jurisprudence in this country, and not by *a priori* assertions, the statement of his position is here given, as extracted from the printed speech, which bears the title, *Slavery protected by the Common Law of the New World: guaranteed by the Constitution. Vindication of the Supreme Court of the United States.*<sup>1</sup>

"Mr. President,—The whole subject of slavery, so far as it is involved in the issue now before the country, is narrowed down at last to a controversy on the solitary point, whether it be competent for the Congress of the United States, directly, or indirectly, to exclude slavery from the Territories of the Union. The Supreme Court of the United States have given a negative answer to the proposition, and it shall be my first effort to support that negation by argument, independently of the authority of the decision.

"It seems to me that the radical, fundamental error which underlies the argument in affirmation of this power, is the assumption that slavery is the creature of the statute law of the several States where it is established; that it has no existence outside of the limits of those States; that slaves are not property beyond those limits; and that property in slaves is neither recognized nor protected by the Constitution of the United

<sup>1</sup> The last title was probably adopted for this speech, not so much in view of its being a vindication of the *law* of the majority of the Court in Dred Scott's case, as of its being partly a reply to Mr. Seward's censures, in the same debate, on the course of the majority of the Supreme Court as having been influenced by political considerations. All such matter of exception or defence is, of course, foreign to the purpose of this treatise.

States, nor by international law. I controvert all these propositions, and shall proceed at once to my argument.

“The thirteen colonies which, on the 4th of July, 1776, asserted their independence, were British colonies, governed by British laws. Our ancestors in their emigration to this country brought with them the common law of England as their birth-right. They adopted its principles for their government so far as it was not incompatible with the peculiarities of their situation in a rude and unsettled country. Great Britain then having the sovereignty over the colonies, possessed undoubted power to regulate their institutions, to control their commerce, and to give laws to their intercourse, both with the mother country and the other nations of the earth. If I can show, as I hope to be able to establish to the satisfaction of the Senate, that the nation thus exercising sovereign power over these thirteen colonies did establish slavery in them, did maintain and protect the institution, did originate and carry on the slave trade, did support and foster that trade, that it forbade the colonies permission either to emancipate or export their slaves, that it prohibited them from inaugurating any legislation in diminution or discouragement of the institution ;<sup>1</sup> nay, more, if at the date of our Revolution I can show that African slavery existed in England as it did on this continent, if I can show that slaves were sold upon the slave mart, in the Exchange and other public places of resort in the city of London as they were on this continent, then I shall not hazard too much in the assertion that slavery was the common law of the thirteen States of the Confederacy at the time they burst the bonds that united them to the mother country.”

§ 522. The brief historical summary of juridical acts, given in the continuation of this speech, upon which Mr. Benjamin

<sup>1</sup> The Senator, to maintain the legality of slavery in the Territories, attributes the existence of slavery in the colonies to a national law of the empire, a law derived from the powers vested by the public law of the colonial period in the crown and parliament of England. Mr. Justice Campbell's argument, maintaining that Congress has no power upon the subject, (19 Howard, 501,) involves the doctrine that its existence depended upon the local legislatures, and that the exercise of power over slavery by the imperial Government was rightfully resisted as usurpation. On this point compare, *ante*, § 215 and note, § 243.



relies, contains no essential fact which has not been considered more at length in the previous chapters of this work. The observations already made herein, on the question whether slaves are property in view of the Constitutional guarantee, apply equally to the propositions here laid down by the Senator. For it has been shown that slavery, as a legal effect, depended on the common law having a national extent throughout the empire during the colonial period only, if at all, while it was attributable to the *law of nations* or the universal jurisprudence of the time ; that it was only the slave condition of imported heathen African slaves, if of any, which was so maintained or recognized by that law ; that the condition of the American-born negro, whether free or slave, depended entirely on the powers held by the local colonial Governments, and that if the slavery of such persons was within the colonies sustained by a common law, that law was still only the local law of a colony, and one distinguishable from the common law having national extent in all parts of the empire.<sup>1</sup>

It follows, therefore, that when in any several jurisdiction or forum of the United States, either a State or a Territory of the United States, the question is of the judicial recognition of slavery, as the condition of a person introduced from some other jurisdiction or forum wherein such slavery had been lawful, such slavery cannot be recognized or maintained simply on the ground that it is a status known to and recognized by the common law prevailing in such State or Territory as its local law, or "law of the land," where not prohibited by any statute.<sup>2</sup>

§ 523. The question would be determined by those principles of private international law, including the so-called rule of comity, which have been set forth in the second chapter. These principles are indeed common law ; but if by applying them slavery should be recognized, such recognition would still be distinguishable from the judicial allowance of slavery under the doctrine, contained in Mr. Benjamin's propositions, that slavery is recognized by universal jurisprudence entering into all common

<sup>1</sup> Compare *ante*, §§ 281, 284, 288, 292, 293, 315, 316.

<sup>2</sup> Compare *ante*, §§ 95, 96, 110, 113, 201.

law known in this country, and that it should, in the case supposed, be regarded as an effect already known to the law having territorial extent in the forum, and one which is maintained under that law, irrespectively of the distinction of domicil.

In any territorial jurisdiction of the United States, which should be like a State of the Union in having a local law, the continuance of the rights and obligations of masters and slaves emigrating thither would depend upon the question whether, by that law, rights inconsistent with slavery were attributed universally, or to all natural persons.<sup>1</sup> If within the national dominion there can be any territory which, like the colonies at the time of their first settlement, is vacant of any local law,<sup>2</sup> there could not, in such territory, be any such universal attribution of rights. And, in such case, it would appear that, on elementary principles, all rights and obligations of persons there found which had existed in their former domicil would continue to exist, so far as the relations to which they were incident continued to be physically possible in such territory. Slavery, if so recognized in such territory might, indeed, be said to exist therein, or be carried thither, by the operation of a common law principle, a principle of unwritten jurisprudence. But its existence would not be attributable to common law in the ordinary sense of customary law having territorial extent in some one jurisdiction or forum. It would not have been recognized as a condition supported by universal jurisprudence, the *law of nations*; as the slavery of captured Indians and imported heathen Africans had been recognized in the colonial law.

§ 524. A principal obstacle to agreeing on any conclusion in these questions of slavery, one fully equal in effect to that caused by the prejudices or sympathies of disputants, is occasioned by the want of terms by which to express existing distinctions. Thus the term *positive law* is sometimes used, as in this work, to designate any rule which, as made coercive by some state, is so distinguishable from mere natural equity or natural justice; such positive law being judicially derived either from the several juridical action of that state, creating a *jus proprium*,

<sup>1</sup> Compare *ante*, §§ 88-92, 113-118.

<sup>2</sup> *Ante*, §§ 123-126.

which may be either statute or customary law, or from universal jurisprudence, the unwritten *law of nations*. But the same term, *positive law*, is also very often used to designate statute law or positive legislation, as distinguished from customary or unwritten law derived by the judicial application of natural reason.

Now since it has repeatedly been said by judges both in states where it is lawful and where it is not, that slavery rests on "positive law,"<sup>1</sup> the proposition is assumed by many persons as admitted, as for example, according to Senator Benjamin in the speech referred to, by the Senators on the other side "in nearly all their arguments, that slavery is the creature of positive legislation and cannot be established by customary law or usage."<sup>1</sup> Against which assumption Mr. Benjamin appropriately cites Lord Stowell in the case of the slave, Grace, 2 Haggard's R. 105, *ante*, p. 194, that in the English colonies slavery was legal by customary law alone.

<sup>1</sup> The leading authority being Lord Mansfield, in *Somerset's case*. There is hardly any other decision in which the phrase *positive law*, simply or without qualification, is used to designate the origin of slavery. But in *Neal v. Farmer*, 9 Geo. R. 578, the court cites a large number of English and American cases as holding the same doctrine. In most of the cases, such other terms are used alone or are made to qualify the term *positive law*, as to designate, with sufficient accuracy, a *jus proprium*. Thus, Holroyd, J., in *Forbes v. Cochrane*, 2 Barn. and Cress. 461, "the plaintiff claims a general property in them" \* \* \* "and he claims this property as founded not upon any municipal law of the country where he resides, but upon a general right," \* \* \* "assuming that there may be such a relation, it can only have a local existence, where it is tolerated by the particular law of the place, to which all persons there resident are bound to submit. Now if the plaintiff cannot maintain this action under the general law of nature independently of any positive institution, then his right of action can be founded only upon some right which he has acquired by the law of the country where he is domiciled." P. 463, "the right of the master, which is founded on the municipal law of the particular place only, does not continue." Here the term *municipal law* is used to express the conception of a *jus proprium*; and see *Lunsford v. Coquillon*, 14 Martin's La. Rep. 402; *Prigg's case*, 16 Peters, 611, "The state of slavery is deemed to be a mere municipal regulation, founded on and limited to the range of territorial laws." *Rankin v. Lydia*, 2 Marshall, (Ky.) 470, "positive law of a municipal character." Curtis, J., 19 Howard, 624; *ante*, p. 550. In *Commonw. v. Aves*, 18 Pick. 212, Judge Shaw employs *positive law* in the same sense of a local or particular law distinguished from one generally recognized. For referring to Lord Mansfield's dictum that slavery, being odious and against natural right, cannot exist, except by positive law, he observes: "But it clearly admits that it may exist by force of positive law. And it may be remarked, that by positive law in this connection may be as well understood customary law as the enactment of a statute; and the word is used to designate rules established by tacit acquiescence or by the legislative act of any state, and which derive their force and authority from such acquiescence or enactment, and not because they are the dictates of natural justice and as such of universal obligation."

<sup>1</sup> So in Hildreth's *Despotism in America*, p. 212; Spooner's *Unconstitutionality of Slavery*.

On the other hand it has been supposed by some persons that, if slavery be attributed to positive law in the sense inclusive of unwritten law, it cannot be attributed at the same time to a law which, *like statute*, is *peculiar* to some one state or possessor of sovereign power. Thus in *Neal v. Farmer*, 9 Geo. R. 581, the court observes that Chief Justice Shaw, in *Sims' case*, and in *Commonw. v. Aves*, 18 Pick. 212, attributing slavery to positive law defines it as including customary law. And because the same Judge, in the latter case, refused to recognize the relation of master and slave, or the condition of slavery, in Massachusetts (in cases not coming within the fugitive slave provision in the Constitution of the United States), the Georgia court supposes an inconsistency. Although Judge Shaw, by his definition of positive law, discriminates some customary law as particular or local, in respect to some one state or nation, and so distinguishable from a universal law.

So Senator Benjamin, in the instance above, supposes that he has proved his point in showing that slavery does not rest upon positive law, in the sense of positive legislation ; and in another place says ; “As to the *right* in them, [slaves] that man has to overthrow the whole history of the world, he has to overthrow every treatise on jurisprudence, he has to ignore the common sentiment of mankind, he has to repudiate the authority of all that is considered sacred with man, ere he can reach the conclusion that the person who owns a slave, in a country where slavery has been established for ages, has no other property in that slave than the mere title which is given by the statute law of the land where it is found.”

Now, although it be admitted or proved that property in slaves does not rest upon positive statute, but upon unwritten law, it is not thereby proved that it rests on a law which originates in “the common sentiment of mankind,” and which judicial tribunals are bound to recognize as presumptively accepted by that possessor of sovereign power whose will they are to apply as positive law.

§ 525. As has been before observed, the discrimination of such laws is principally requisite in the application of interna-

tional private law.<sup>1</sup> Thus the English case of *Forbes v. Cochrane*, in which Holroyd, J., in a part of his opinion already noted, distinguished slavery as resting on a "municipal," local, or "particular" law of some one country in contradistinction to "general right" or "general law of nature," was one involving the application of that international law. And the same opinion is cited by Chief Justice Shaw, in *Commonwealth v. Aves*, 18 Pick., in deciding that, independently of any provision in the Constitution of the United States, the right of a master in respect to a slave, which was valid or legal in Louisiana, the place of their domicil, could not be recognized in Massachusetts by international private law. And Judge Shaw, giving his conception of the distinction in his own language, says, p. 216, "This view of the law applicable to slavery marks strongly the distinction between the relation of master and slave, as established by the local law of particular states and in virtue of that sovereign power and independent authority which each independent state concedes to every other, and those natural and social relations which are everywhere and by all people recognized, and which, though they may be modified and regulated by municipal law, are not founded upon it, such as the relation of parent and child, and husband and wife."<sup>2</sup> Such also is the principle upon which the general right of property is founded, being in some form universally recognized as a natural right, independently of municipal law.

"This affords an answer to the argument drawn from the maxim that the right of personal property follows the person, and, therefore, where by the law of a place a person there domiciled acquires personal property, by the comity of nations the same must be deemed his property everywhere. It is obvious, that if this were true, in the extent in which the argument employs it, if slavery exists anywhere, and if, by the laws of any place a property can be acquired in slaves, the law of slavery must extend to every place where such slaves may be carried. The maxim, therefore, and the argument can apply only to

<sup>1</sup> *Ante*, §§ 101, 158, 306.

<sup>2</sup> Compare *ante*, § 109.

those commodities which are everywhere, and by all nations, treated and deemed subjects of property."

§ 526. But, from not distinguishing any other visible *origin* of law than the several will of single states or nations, jurists of the highest eminence sometimes, (as in the instance of the Georgia case and of Senator Benjamin's argument, last cited,) assume that, if a relation is proved to exist by unwritten, customary law, judicial application of natural reason, in one forum or under one possessor of sovereign power, it is thereby proved to have legal existence in every other country as customary law, judicial application of natural reason. Or, sometimes, while discriminating a law which has judicial recognition in every forum by reason of its *universality*, and which is to be distinguished from the *local* or *particular* law (statute or customary) of some one country, they confound their own (subjective) idea of right, or what they call "natural law," the judgment of their individual moral sense, with the (objective) conception of right furnished by the juridical history of the world, or of those nations with whose international relations they are conversant, the historical *law of nations*.<sup>1</sup> In other words, instead of strictly observing what rules are recognized among all or many nations, assuming that they are founded in natural reason, (as the Roman attributed to *naturalis ratio* whatever *apud omnes populos peræque custoditur*,<sup>2</sup>) and applying these as universal jurisprudence, (*jus gentium*,) they determine what, by their individual natural reason, should be recognized among all nations, and apply that as the universal rule, calling it "the general law of nature," "the dictates of natural justice;" or using some similar term appropriate to designate a rule of ethics.

Illustrations of this latter error are given both by those who demand that slavery shall be everywhere judicially recognized, as supported by customary law, and by those who deny it that recognition.

§ 527. Thus in the definition, in *Commonw. v. Aves*, already given, of *positive law*, where he distinguishes it as the rules which are "established by tacit acquiescence or by the legis-

<sup>1</sup> *Ante*, p. 109, note.

<sup>2</sup> *Ante*, § 152.

lative act of any state, and which derive their force and authority from such acquiescence or enactment," Judge Shaw refers to other rules, as being also *law* ; calling them "the dictates of natural justice, and as such of universal obligation;" apparently, however, without acknowledging any other index of these latter than the individual conscience of the tribunal exercising jurisdiction.

A passage from the same opinion has already been cited as giving what is probably the clearest instance of a judicial attribution of slavery to "local" or "particular" laws, as distinguished from a universal jurisprudence. But though in the conclusion of the passage, Judge Shaw particularly indicates that some objects of rights are to be recognized as "those commodities which are everywhere and by all nations treated and deemed subjects of property," thus distinguishing the true historical criterion by which (independently of local statute or custom) property may be known, still, in that which immediately follows, the Judge, virtually, makes himself the exclusive arbiter of what may or may not be legal property ; saying, "But it is not speaking with strict accuracy to say that a property can be acquired in human beings by local laws. Each state may, for its own convenience, declare that slaves shall be deemed property, and that the relations and laws of personal chattels shall be deemed to apply to them ; as for instance, that they may be bought and sold, delivered, attached, levied upon, that trespass will lie for an injury done to them or trover for converting them. But it would be a perversion of terms to say that such local laws do in fact make them personal property generally ; they can determine that the same rules of law shall apply to them as are applicable to property, and this effect will follow only so far as such laws *proprio vigore* can operate."

It is evident that, in this instance, either a very distinguished jurist and judge of the largest judicial experience asserts, in contradiction to the history of the world, that it is morally impossible that a human being should be property by the law of any country, or else, if his argument recognizes a universal law independent of his individual judgment, the argument is a pe-



titio principii. For the question then being, are slaves property by a local law, or are they property by the universal law?—the judge finds the answer by saying,<sup>1</sup> if they be considered property by universal law, they would be slaves everywhere; they would be slaves in Massachusetts; therefore they are property by a local law, and not by the universal.<sup>2</sup>

§ 528. A similar identification of the universal law with the moral judgment of the individual jurist occurs in the speech of Senator Benjamin, already referred to, when replying to a passage in the speech of Mr. Collamer, of Vermont, on the same subject,<sup>3</sup> the whole of whose argument, he says, “ingeniously as it

<sup>1</sup> See the last paragraph in § 511.

<sup>2</sup> To the idea that the universal law, which is distinguishable from that peculiar to single states or nations, is not at the same time known as a rule set or laid down, (*positum, jus constitutum, ante*, § 17.) by any judicial criterion of the will of the sovereign, distinguishable from the individual moral sense of the judge, may also be ascribed the remark on page 215 of the same report: “That slavery is a relation founded on force, not in right, existing where it does exist, by force of positive law and not recognized as founded in natural right, is intimated by the definition of slavery in the civil law: *Servitus est constitutio juris gentium qua quis dominio alieno contra naturam subicitur.*” But this *jus gentium* is the very criterion of what a judge may recognize as a rule of universal law; and is to be received whether contrary to natural law or not. That, by it, slavery is not now judicially recognized in Massachusetts, as formerly, in the case of imported heathen negroes, is not owing to the better acquaintance of the judges with the law of nature, but to the fact that there is *now* no rule of universal jurisprudence, *jus gentium*, to support the master’s right.

<sup>3</sup> The portion of Senator Collamer’s speech to which Senator Benjamin refers, is as follows: “I do not say that slaves are never property. I do not say that they are, or are not. Within the limits of a State which declares them to be property they are property, because they are within the jurisdiction of that government which makes the declaration; but I should wish to speak of it in the light of a member of the United States Senate, and in the language of the United States Constitution. If this be property in the States, what is the nature and extent of it? I insist that the Supreme Court have often decided, and every body has understood, that slavery is a local institution, existing by force of State law; and of course that law can give it no possible character beyond the limits of that State. I shall, no doubt, find the idea better expressed in the opinion of Judge Nelson, in this same Dred Scott decision. I prefer to read his language. He declares:

“ ‘Every State or nation possesses an exclusive sovereignty and jurisdiction within her own territory, and her laws affect and bind all property and persons residing within it. It may regulate the manner and circumstances under which property is held and the condition, capacity, and state of all persons therein; and also the remedy and the modes of administering justice. And it is equally true that no State or nation can affect or bind property out of its territory, or persons not residing within it. No State, therefore, can enact laws to operate beyond its own dominions; and if it attempts to do so, may be lawfully refused obedience. Such laws can have no authority extra-territorially. This is the necessary result of the independence of distinct and separate sovereignties.’ [19 Howard, p. 460.]

“ Here is the law; and under it exists the law of slavery in the different States. By virtue of this very principle it cannot extend one inch beyond its own territorial limits. A State cannot regulate the relation of master and slave, of owner and property, the manner and title of descent, or any thing else, one inch beyond its territory.

is put, rests upon this fallacy, if I may say so with due respect to him, that a man cannot have *title* in property wherever the law does not give him a *remedy* or *process* for the assertion of his title ; or, in other words, his whole argument rests upon the old confusion of ideas which considers a man's right and his remedy to be one and the same thing. I have already shown to you, by the passages I have cited from the opinions of Lord Stowell and of Judge Story, how they regard this subject. They say that the slave who goes to England, or goes to Massachusetts, from a slave State, is still a slave, that he is still his master's property ; but that his master has lost control over him, not by reason of the cessation of his *property*, but because those States grant no *remedy* to the master by which he can exercise his control.

“There are numerous illustrations upon this point, illustrations furnished by the copyright laws, illustrations furnished by patent laws. Let us take a case ; one that appeals to us all. There lives now a man in England who from time to time sings to the enchanted ear of the civilized world strains of such

Then you cannot, by virtue of the law of slavery, if it makes slaves property in a State, if you please, move that property out of the State. It ends whenever you pass from that State. You may pass into another State that has a like law, and if you do, you hold it by virtue of that law ; but the moment you pass beyond the limits of the slave-holding States, all title to the property called property in slaves, there ends. Under such a law slaves cannot be carried as property into the Territories or anywhere else beyond the States authorizing it. It is not property anywhere else. If the Constitution of the United States gives any other and further character than this to slave property, let us acknowledge it fairly and end all strife about it. If it does not, I ask, in all candor, that men on the other side shall say so, and let this point be settled. What is the point we are to inquire into ? It is this : does the Constitution of the United States make slaves property beyond the jurisdiction of the States authorizing slavery ? If it only acknowledges them as property within that jurisdiction it has not extended the property one inch beyond the State line ; but if, as the Supreme Court seems to say, it does recognize and protect them as property further than State limits, and more than the State laws do, then, indeed, it becomes like other property. The Supreme Court rest this claim upon this clause of the Constitution : ‘No person held to service or labor in one State under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.’ Now the question is, does that guarantee it ? Does that make it the same as other property ? The very fact that this clause makes provision on the subject of persons bound to service, shows that the framers of the Constitution did not regard it as other property. It was a thing that needed some provision, other property did not. The insertion of such a provision shows that it was not regarded as other property. If a man's horse stray from Delaware into Pennsylvania, he can go and get it. Is there any provision in the Constitution for it ? No. How came this to be there, if a slave is property ? If it is the same as other property, why have any provision about it ?”

melody that the charmed senses seem to abandon the grosser regions of earth, and to rise to purer and serener regions above. God has created that man a poet. His inspiration is his ; his songs are his by right divine ; they are his property, so recognized by human law. Yet here in these United States men steal Tennyson's works and sell his property for their profit ; and this because, in spite of the violated conscience of the nation, we refuse to give him protection for his property.

“Examine your Constitution ; are slaves the only species of property there recognized as requiring peculiar protection ? Sir, the inventive genius of our brethren of the North is a source of vast wealth to them and vast benefit to the nation. \* \* \* On what protection does this vast property rest ? Just upon that same constitutional protection which gives a remedy to the slave-owner when his property is also found outside of the limits of the State in which he lives. Without this protection what would be the condition of the northern inventor ? Why, sir, the Vermont inventor protected by his own law would come to Massachusetts, and there say to the pirate who had stolen his property, ‘render me up my property or pay me value for its use.’ The Senator from Vermont would receive for answer, if he were counsel for the Vermont inventor, ‘Sir, if you want protection for your property, go to your own State ; property is governed by the laws of the State within whose jurisdiction it is found ; you have no property in your invention outside of the limits of your State ; you cannot go an inch beyond it.’ Would not this be so ? Does not every man see at once that the right of the inventor to his discovery, that the right of the poet to his inspiration, depends upon those principles of eternal justice which God has implanted in the heart of man, and that wherever he cannot exercise them it is because man, faithless to the trust that he has received from God, denies them the protection to which they are entitled.”

Here it is evident either, that it must be first admitted that legal property is determined by the speaker's own idea of what men *should* own by law or be protected by law in possessing, and depends upon his individual conception of “those principles

of eternal justice which God has implanted in the heart of man ;” or, else, that the reference to copy-rights and patent-rights is singularly infelicitous for the purposes of his argument. For, by his own admission, such rights are *legal* rights, i. e., rights recognized in courts of law, only within certain limited jurisdictions ; and even therein are not known as property by customary law, and cannot be judicially recognized as legal rights in other countries though made such in some one country by its positive legislation. And yet Mr. Benjamin had proposed at the outset, (in the extract first given,) to show “that slavery was the *common law* of the thirteen States of the confederacy at the time they burst the bonds that united them to the mother country ;” and the printed speech bears among its titles, *Slavery protected by the Common Law of the New World* ; while here slaves are classed with “species of property recognized [by the Constitution] as requiring peculiar protection,” and not even recognized by common law in any state or nation.

§ 529. The Senator to whom Mr. Benjamin was replying, (Mr. Collamer,) had, in a part of his argument which has been noted, instanced horses, as objects of the action of legal persons which, when they are objects of rights,<sup>1</sup> can be nothing else than property. And, assuming it to be admitted that the Constitution recognizes some objects of rights as being *property*, he argued that the existence of special provisions, protecting rights in respect to slaves, proves that they are not recognized as property even when they are regarded as objects of rights. But his argument indicated no standard by which to prove that horses are property, more than are other objects of rights. Hence, Mr. Benjamin, in a passage immediately following the last extract from his speech, impeaches the argument on the ground, apparently, that horses are known to be property only by the same juridical evidence which shows slaves to be property. He remarks :

“ Sir, follow out the illustration which the Senator from Vermont himself has given ; take his very case of the Delaware owner of a horse, riding him across the line into Pennsylvania

<sup>1</sup> For this use of terms, see *ante*, §§ 21-24.

The Senator says : ‘ Now, you see that slaves are not property like other property ; if slaves were property like other property, why have you this special clause in your Constitution to protect a slave ? You have no clause to protect the horse, because horses are recognized as property everywhere.’ Mr. President, the same fallacy lurks at the bottom of this argument, as of all the rest. Let Pennsylvania exercise her undoubted jurisdiction over persons and things within her boundary ; let her do as she has a perfect right to do, declare that hereafter, within the State of Pennsylvania, there shall be no property in horses, and that no man shall maintain a suit in her courts for the recovery of property in a horse ; and where will your horse-owner be then ? Just where the English poet is now ; just where the slaveholder and the inventor would be if the Constitution, foreseeing a difference of opinion in relation to rights in these subject matters, had not provided the remedy in relation to such property as might easily be plundered. Slaves, if you please, are not property like other property in this, that you can easily rob us of them ; but as to the *right* in them, that man has to overthrow the whole history of the world, he has to overthrow every treatise on jurisprudence, he has to ignore the common sentiment of mankind, he has to repudiate the authority of all that is considered sacred with man, ere he can reach the conclusion that the person who owns a slave, in a country where slavery has been established for ages, has no other property in that slave than the mere title which is given by the statute law of the land where it is found.”

It appears that both Senators were arguing on the supposition that the Constitution protects some rights of private persons, or rights of private persons in respect to some objects, as rights in respect to *property* ; but that, to determine whether either horses or slaves, or both horses and slaves, or neither horses nor slaves, are property, neither Senator designated any other standard than either the legislative will of some State of the Union or his own individual judgment. And for the reason, apparently, that while each had in mind the idea of a universal jurisprudence, entirely distinct from their own several judgments, they had no *terms* by

which to distinguish—1st, that part of positive law which, whether customary or statute, all equally originates in the several legislative (juridical) action of a single state or possessor of sovereign power, *jus proprium*, and 2d, that part of positive law which, being customary or unwritten, differs from every part of the former by being attributable to the legislative (juridical) action of all or many states or possessors of sovereign power, *jus gentium*. And to the same want of proper terms are attributable the contradictions observable in the judicial determination of these questions.<sup>1</sup>

§ 530. In the extract given, Senator Benjamin has referred to Lord Stowell and Judge Story as authorities for the juristical contradiction in terms, that a natural person may be property in a place where the law allows no one to treat him as such, nor allows any to exercise dominion over him. The portions of Lord Stowell's opinion, which were referred to, had been given in another part of the speech. Their citation in this connection was probably an inadvertence ; they are to another point ;<sup>2</sup> and other parts of the opinion might, with some propriety, have been referred to for the doctrine, such as pp. 100, 112, 113, of 2 Haggard's Rep. And particularly page 117, where Lord Stowell quotes Chancellor Northington's brief opinion in *Shanley v. Harvey*, "As soon as a man sets foot on English ground he is free. A negro may maintain an action against his master for ill-usage, and may have a *habeas corpus* if restrained of his

<sup>1</sup> Compare *ante*, p. 378, notes. Illustrating Lord Bacon's remark in *De Augmentis*, Lib. V., ch. iv., when defining the *eidolon fori*, idol of the market ; *Credunt homines rationem suam verbis imperare, sed fit etiam ut verba vim suam super intellectum retorqueant et reflectant*. "For words generate words, however men may imagine they have command over words, and can easily say they will speak with the vulgar and think with the wise."

<sup>2</sup> The citations are, case of the slave, *Grace*, 2 Hagg. p. 126–128. In these nothing else is declared but that slavery, being in Antigua the effect of customary law, having been "a very favored introduction into the colonies," and also introduced by the mother country as profitable to herself, could not, by any English court, be regarded as a *malus usus* in the colony, and declared unlawful there on the maxim *malus usus abolendus*. The extract given from Story's letter to Stowell is, "I have read with great attention your judgment in the slave case. Upon the fullest consideration which I have been able to give the subject, I entirely concur in your views. If I had been called upon to pronounce a judgment in a like case, I should have certainly arrived at the same result." This result was, that on returning to Antigua the woman, *Grace*, was there, by the rules of private international law, in the same status of slavery in which she had been before going to England.



liberty," and, with an ingenuity that is best designated ludicrous, endeavors to extract from it the recognition of slavery as co-existing with its contrary; upon which idea to support his judgment that, on returning to the colony, the negro returns a slave. His reasoning involves the doctrine, utterly inconsistent with every definition of law, that while the rights and obligations of a natural person are judicially determinable by one law, another law producing effects incompatible with those rights and obligations may still be operating on the same person in the same jurisdiction.<sup>1</sup>

In another place, p. 109, Lord Stowell excepts to the arguments advanced by Hargrave and the reasoning given by Lord Mansfield to show that Somerset became free or acquired the status of a freeman by being in England; such as the rhetorical phrase that "the air of England was too pure for slaves to breathe in," and those denials of the ethical fitness of slavery which, if they were the ground for declaring the slave free in England, should, on Lord Mansfield's and probably Lord Stowell's

<sup>1</sup> Lord Stowell would hardly have sympathized with Tennyson in praising England as a land

"Where Freedom broadens slowly down  
From precedent to precedent."

<sup>2</sup> Hagg. 117; "The Lord Chancellor Northington, in dismissing the bill with costs, said, that as soon as a man sets foot on English ground he is free. It must be observed that this was the first time, probably, that this doctrine was so broadly stated in an English court, and, perhaps, a little prematurely; but it must likewise be observed that his Lordship here mentions only two effects of it, for he adds, 'A negro may maintain an action against his master for ill-usage and may have a *habeas corpus* if restrained of his liberty.' This is an instance in which the law of England differed essentially from the law of the slave code in the West India colonies, for there every acquisition by the slave, whether by legacy or otherwise, went to the master, but not so here, where the law of England adjudged it to the slave. And the Lord Chancellor enumerates another difference, which is, that the law of England empowered the slave to bring an action against his master for ill-treatment. Both of these are direct contradictions to the rules of the slave code; but nobody could infer from thence that the whole of the slave code was by that decision intended to be vacated in the colonies on that account. The error of the opinion seems to be, that because the slave code was overruled in England, where the law of England differed from it, it was therefore abrogated in the colonies *in toto*. The slave continues a slave, though the law of England relieves him in those respects from the rigors of that code while he is in England, and that is all that it does. With respect to other severities which it refuses to inflict it is *spinis de pluribus una*, which does not at all dislodge the other severities of that code, all of which he may avoid by continuing in this country." In the case before Northington, nothing could be decided about the colony, and nothing was said about it. See *ante*, § 187. To make out "the error of the opinion," Lord Stowell supposes that the existence of slavery in the colony was questioned by it.



theory of the foundation of colonial law,<sup>1</sup> have made slavery unlawful in the colony. But in the same place he admits the application of the argument, that, even if it was not shown how the slave became invested, in England, with the rights of a freeman, there was on the other hand no law in England to support the master's claims while there; or, that since the law gave him no legal remedy the law attributed to him no legal right. "The arguments of counsel do not go further than to establish that the methods of force and violence which were necessary to maintain slavery were not practicable in this spot; and Mr. Hargrave, almost in direct terms, asserts that they cannot go beyond it." This is the doctrine which Lord Stowell does not venture to impeach; the doctrine recognized by Lord Mansfield when he said of the detention exercised by the master, "So high an act of dominion must be recognized by the law of the country where it is used," and, because it was not so recognized, added, "the black must be discharged."<sup>2</sup> This is the doctrine that where the law gives no *remedy* the law recognizes no *right*; the doctrine asserted by Mr. Collamer, and designated by Mr. Benjamin, a "fallacy."

§ 531. On the principle that Congress cannot legislate where no power is granted by the Constitution, Judge McLean denies

<sup>1</sup> *Ante*, pp. 374-376.

<sup>2</sup> *Ante*, p. 191. Lord Stowell's position resembled that of Lord Mansfield, in *Somerset's case*; he was unable to find the judicial reason for a judgment which may probably be justified on the distinctions of domicile which were stated, *ante*, pp. 384-386.

As has been remarked, *ante*, p. 379, and note 3, the opinion seems to have obtained at one time, among English lawyers, that though the slave was no longer *property* in England for which trover would lie, yet the master's right to perpetual service might continue. Though this doctrine was clearly against the authorities even before *Somerset's case*, it may have been the basis of Lord Stowell's opinion. Blackstone, 1 Comm. p. 424. "And now it is laid down that a slave or negro, the instant he lands in England becomes a freeman; that is the law will protect him in the enjoyment of his person and his property. Yet with regard to any right which the master may have lawfully acquired to the perpetual service of John or Thomas, this will remain exactly in the same state as before; for this is no more than the same state of subjection for life which every apprentice submits to for the space of seven years or sometimes for a longer term." Mr. Christian notes that "the meaning of this sentence is not very intelligible," and denies the validity of any contract made by the slave to serve for life. Blackstone also says, "whatever service the heathen negro owed of right to his owner or master, by general, not local law, the same, whatever it may be, he is bound to render when brought to England and made a Christian." But, as has been shown, there is no service due by "general law" when the slave is no longer a chattel *jure gentium*.

that Congress may legalize slavery by statute.<sup>1</sup> But on the same principle it would seem that freedom could not be legalized by statute. Mr. Justice Nelson, in his opinion in *Dred Scott's* case, 19 Howard, 464, says: "If Congress possesses the power under the Constitution to abolish slavery in a Territory, it must necessarily possess the like power to establish it. It cannot be a one-sided power, as may suit the convenience or particular views of the advocates. It is a power, if it exists at all, over the whole subject." Judge McLean finds the legislative power to establish slavery "prohibited by the Constitution or contrary to its spirit." The same, if true, should prevent the executive and judiciary created by the Constitution from recognizing or maintaining slavery under laws already existing in the Territories. But it is by resorting to the spirit of the Constitution that Judge Campbell invests the national legislature and the national judiciary and executive with the power and duty of extending and maintaining, in the Territories, the laws of the slave-holding States.

Legal rights and obligations exist only by the co-operation of the three functions of sovereign power. The reasoning of more than one member of the Supreme Court, in *Dred Scott's* case, involves the doctrine that rights and obligations incident to the status of persons are maintained, in the Territories, by the executive and judicial functions held by the national Government, while the legislative, or, more correctly, the juridical function, by which those rights and obligations are determined, is not invested in any body; but remains *in nubibus* until a new State of the Union is created which may assume it.

§ 532. Whatever power the national Government may, of right, exercise in the Territories has either been expressly or impliedly granted by the words of the Constitution, or it has not so been granted.

It must be admitted that the Constitution grants to the executive and judiciary created by it power to maintain and enforce only such rights and obligations as are referable to the

<sup>1</sup> 19 Howard, 532, and *ante*, p. 542.

law of the United States, that is, a rule resting on the juridical will of the people of the United States, the authors of the Constitution.

Now the only law of the United States, affecting private persons, which is described or referred to in the Constitution is either law contained in the Constitution itself, or derived either from the legislation of Congress or from the treaty-making power<sup>1</sup> held by the President and Senate.<sup>2</sup> And, if, as is commonly said, there can be no other law of the United States, or rule identified with the juridical will of the people of the United States,<sup>3</sup> it would appear that the rights and obligations of private persons which may be maintained by the executive and judicial functions of the national Government, in virtue of power granted in the Constitution, are only such as are determinable and determined by one of these three indicators of the national will.

The Constitution gives the executive and judiciary created by it power to enforce rights and obligations created by the law of a State of the Union only in certain specified cases; when, by the provisions of the Constitution taking effect as private law, those rights and obligations become actually effects of the national law.<sup>4</sup> Now, even admitting that the several legislative or juridical power of a State of the Union may determine the status of persons domiciled in the Territory (Judge Campbell's theory), the Constitution does not grant to the national executive and judiciary the power of maintaining, in such case, the rights and obligations which would be created by the State law. If then the rights and obligations incident to the status of persons in the Territories are not fixed by the private law of the Constitution, nor by legislative power exercised in the conclusion of a treaty, nor by legislative power exercised by Con-

<sup>1</sup> *Ante*, pp. 480, 481.

<sup>2</sup> Const. Art. II. sec. 2.

<sup>3</sup> Curtis' Comm. § 19. "The law of the United States is to be found in the Constitution and the Acts of Congress passed in pursuance of it," citing *Wheaton v. Peters*, 8 Peters, 591. It is difficult to say how far rights and obligations in relations between private persons can be judicially recognized under a treaty alone, independently of the principles of private international law which would operate where dominion had been acquired without a treaty. This question is to be further considered hereinafter.

<sup>4</sup> *Ante*, § 445.

gress, it follows that the executive and judicial functions of the national Government cannot be applied to maintain such rights and obligations in virtue of any grant of power, contained in the Constitution, to the national executive and judiciary.

§ 533. And if these functions of sovereign power, the executive and judicial functions, may be exercised by the national Government to maintain in the Territories any rights and obligations of private persons, not determined by the private law of the Constitution nor ascribable to an exercise of juridical power in some treaty, there are only two theories or views of public law on which their exercise can be justified. Either the legislative or juridical power which determines those rights and obligations has been granted to Congress in the Constitution, (being limited by the Constitution operating as a bill of rights,) or else the three functions of sovereign power are, in reference to the Territories, held by the national Government as an integral political personality, representing the people of the United States, independently of separate grants of power in the written Constitution to its executive, legislative, and judiciary departments, (being, nevertheless, limited by the Constitution operating as a bill of rights,) and the rights and obligations maintained and enforced by the executive and judicial functions, held by that Government, are derived from or dependent on the legislative (juridical) power held by Congress.

There is certainly no consistency in denying the legislative power of Congress over the rights and obligations incident to the status of persons in the Territories, by alleging that the power to create, establish, or determine such rights and obligations, has not been granted, while at the same time the exercise of executive and judicial power, in reference to the same subject, is maintained ; though equally unsupported by any grant in the Constitution. For whether the executive and judicial functions are employed to enforce a rule derived from statute or from unwritten jurisprudence, and whether the rule enforced by them was or was not first promulgated by Congress, the juridical

power of the nation is as much exercised in one case as in the other.<sup>1</sup>

Whether the power to determine the status or condition of private persons in the Territories has or has not been granted to Congress, by the Constitution, in terms, there is but one conclusion ; either Congress has the power, (limited only by the Constitution operating as a bill of rights,) or else the executive and judicial functions of the national Government cannot be exercised in reference to rights and obligations incident to the status or condition of such persons. In other words, either the rights and obligations incident to status in the Territories are maintained by *the three* functions of sovereignty held by the Government created by the Constitution, (limited only by the Constitution operating as a bill of rights and as private law,) or else they are maintained by those functions invested in some other depositary or possessor of sovereign power.

A judge adopting any other theory for the action of the executive and judiciary, in reference to the subject, must himself virtually assume the legislative (juridical) power which he denies to Congress.<sup>2</sup>

§ 534. The attribution of *relative* rights is possible only under particular circumstances of natural condition, or circumstances in which it is not necessary that all persons should be found, and those rights, therefore, are not necessarily either attributed or denied to each person under positive law. But all natural persons are in circumstances in which *individual* rights and capacity for relative rights may be attributed to them, and each person under positive law must be either a legal person, by the attribution of those rights and that capacity, or be a chattel or thing, by being only the legal object of rights attributed to other natural persons.

<sup>1</sup> See North Am. Rev., April, 1858, p. 477, in an article on Duer's Constitutional Jurisprudence.

<sup>2</sup> Compare the language of Mr. Justice Curtis, in 19 Howard, 620, 621, (*ante*, p. 547, 548,) concluding : " we are under the government of individual men, who for the time being have the power to declare what the Constitution is, according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican Government, with limited and defined powers, we have a Government which is merely an exponent of the will of Congress ; or what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this court."

Although no legal right is herein supposed to exist of necessity or by a natural law, independently of positive law as herein defined, yet individual rights are, in this sense, natural or primordial, that, wherever a natural person exists in a state or organized civil society, these rights must either be legally attributed to him or be denied by the maintenance of antagonistic rights in others. And since status or personal condition consists in the attribution or denial of individual rights and capacity for relative rights, a status of freedom or of some of its contraries is necessarily attributed to each person living under positive law.<sup>1</sup>

The rights of masters immigrating with slaves into the Territories may be there maintained, as they existed under the law of their *State* domicil, by enforcing obligations correlative to those rights on the part of the slaves and of all other persons ; or those rights may be disallowed, and the slaves placed in different relations towards their former masters and other persons. But either the national juridical power must be manifested in the Territories, in the maintenance, by the executive and judicial functions of the national Government, of those rights and obligations by whose realization status or personal condition exists, or else the sovereign power of determining status or condition must be abandoned to whomsoever may there have the force to maintain those obligations for themselves and others.

Of necessity, therefore, whether Congress should or should not legislate on the subject, either freedom or its contraries are maintained and extended by the action of the national Government in the condition of every natural person acquiring a residence in the Territories. And it is absurd to say, that in respect to the extension or non-extension of slavery and freedom in the territory of the United States, the national Government may do neither.<sup>2</sup>

<sup>1</sup> For this use of terms compare *ante*, §§ 40-44.

<sup>2</sup> In the address of the Southern delegates in Congress, to their constituents, Feb. 1849, drawn by Mr. Calhoun, and published among his Works, vol. vi., on pages 301, 302, is the following :

“The North no longer respects the Missouri compromise line, though adopted by their almost unanimous vote. Instead of compromise, they avow that their determination is to exclude slavery from all the territories of the United States, acquired or to be acquired ; and, of course, to prevent the citizens of the Southern States from emigrating with their property in slaves into any of them. Their object, they allege, is

§ 535. The questions, what conditions of freedom or its contraries may exist by law in the Territories, independently of statute ; whether negro slavery may or may not exist there by law, and whether it may be lawful or will continue there in the case of slaves brought from the slave-holding States independently of positive legislative enactment, and to what possession of sovereign power the law affecting conditions of freedom and its contraries may be ascribed in any one of the several Territories of the United States, regarded as jurisdictions having a several local municipal law, as distinguished from the national municipal law, are to be considered in another volume, in the historical exposition of the laws of the several jurisdictions embraced within the entire dominion of the United States.

But if the method of determining the status of private persons in the Territories which was indicated by Mr. Justice Campbell and supported to some degree by Justices Daniel and Catron, in the passages cited from their opinions in Dred Scott's case, is legitimate, it is evident that the distinction of the laws prevailing within the dominion of the United States as being

to prevent the extension of slavery, and ours to extend it, thus making the issue between them and us to be the naked question, Shall slavery be extended or not? We do not deem it necessary, looking to the object of this address, to examine the question so fully discussed at the last session, whether Congress has the right to exclude the citizens of the South from emigrating with their property into territories belonging to the confederated States of the Union. What we propose in this connection is, to make a few remarks on what the North alleges, erroneously, to be the issue between us and them.

"So far from maintaining the doctrine which the issue implies, we hold that the Federal Government has no right to extend or restrict slavery, no more than to establish or abolish it, nor has it any right whatever to distinguish between the domestic institutions of one State, or section, and another, in order to favor the one and discourage the other. As the federal representative of each and all the States, it is bound to deal out, within the sphere of its powers, equal and exact justice and favor to all. To act otherwise, to undertake to discriminate between the domestic institutions of the one and another, would be to act in total subversion of the end for which it was established, to be the common protector and guardian of all. Entertaining these opinions, we ask not, as the North alleges we do, for the extension of slavery. That would make a discrimination in our favor, as unjust and unconstitutional as the discrimination they ask against us in their favor. It is not for them nor for the federal Government to determine whether our domestic institution is good or bad ; or whether it should be repressed or preserved. It belongs to us, and to us only, to decide such questions. What then we do insist on, is, not to extend slavery, but that we shall not be prohibited from emigrating with our property into the Territories of the United States because we are slaveholders ; or, in other words, that we shall not on that account be disfranchised of a privilege possessed by all others, citizens and foreigners, without discrimination as to character, profession, or color. All, whether savage, barbarian, or civilized, may freely enter and remain, we only being excluded."



either national or local in extent, (which was made in the thirteenth chapter,) would be improper. The law derived from the separate or reserved powers of a State of the Union would be improperly described as *local* in respect to the limits of the State, if any persons before domiciled in such State, were found in the Territories. And the law prevailing in a Territory, or, at least, all law determining the possession of individual rights and legal capacity, would not be local as to the Territory, but a variable aggregate of the laws of a greater or less number of *the States*, having there a personal extent. Or the only local law determining that class of rights would be those applying to persons not known to have been formerly domiciled in some one of the States.<sup>1</sup>

§ 536. And, since rights cannot be maintained except by the enforcement of obligations existing correlatively in some relation between persons, in supposing that the law of a State operates in the Territory to determine the rights of persons therein who before had been domiciled in that State, correlative obligations on the part of persons in the same Territory, though coming from another State, are necessarily supposed to be determined by the laws of the first. In determining the various relations which may exist between the inhabitants of a certain forum or jurisdiction, juridical power may be divided ; so that some relations are determinable by one juridical person and others by another. As, for example, in each State of the Union the powers held by the national Government and the "reserved" powers of the State determine different relations. But it is impossible that in any one relation the rights and obligations of those between whom it exists should be respectively determined by different legislators. The individual right of property involves the existence of obligations on the part of the community ; and the right of a slave owner in respect to his slave as the object of his right of property, involves various obligations on the part of other persons in the same jurisdiction.<sup>2</sup> The doctrine that the

<sup>1</sup> And it would seem that under that theory the State law would govern the condition of the descendants of the emigrants from the States ; carrying out the idea of personal laws having a heritable character. Compare *ante*, § 193.

<sup>2</sup> Compare *ante*, p. 309, note 1.

juridical authority of a State shall *proprio vigore* maintain the rights of its slave-holding citizens and status of their slaves in the Territory is, by involving the determination of the obligations of other persons not coming from the same State, incompatible with the idea that the laws of the States may, in the Territory, respectively determine the rights and obligations of persons previously domiciled within their several jurisdictions.<sup>1</sup>

§ 537. The further exposition of the local municipal laws of the United States will therefore be given in the form of an historical or chronological abstract of the various legislative enactments in and for the several States, the Territories of the United States, &c., affecting personal condition or status ; being a continuation of the abstract of the colonial laws, having like effect, which was given in the sixth chapter. In this will be included a notice of those provisions of the several State Constitutions which affect this topic of private law. Where such legislation refers to persons as alien to the jurisdiction, it will be noticed in its chronological order among the provisions of internal law, the law applying to resident or domiciled persons. Though its effect and constitutionality, in reference to the national Constitution, (national municipal, *quasi*-international law,) will be more particularly considered in a separate chapter, under the head or topic of that international law which is law in the imperfect sense, when the several States are regarded as its subjects, by reason of their independent authority, and which is, therefore, in each State, as private law, or when taking effect on private persons, identified in authority with the local municipal law of that State.

§ 538. In considering the various statutes and constitutional

<sup>1</sup> Different systems of laws, having different personal extent, may exist together within the same dominion. Such laws may, historically, be of different origin. But while co-existing in some one State or territorial jurisdiction, their legal force or authority is derived from one and the same sovereign having the power to determine the conflict of laws which would arise, (*Ante*, pp. 25, 100.) It is a novel idea in jurisprudence that laws differing in personal extent, and deriving their authority from different sovereigns, should co-exist within the same territorial dominion. See Judge McLean's observation, *ante*, p. 545. Judge Campbell's idea, assuming that the States severally are sovereign in the Territory, seems to be that they colonize lands vacant of law, and that the citizens of each carry with them the laws of the mother State ; as the English colonists brought the laws of England. *Ante*, p. 116.

provisions of the several States, a distinction will sometimes be noticed between such as refer to persons and to their relations, rights, and obligations as determined by laws already existing, and which are therefore to be applied according to the personal quality of those laws, and provisions whose terms require a broader application, or which seem to attribute rights or obligations to all natural persons, irrespectively of personal distinctions previously known ; which provisions, therefore, may be held to be proclaimed by the supreme legislating power as *universal*. Since the universality of a law, however, properly becomes matter of judicial recognition only by the application of private international law,<sup>1</sup> the existence of law having this universal personal extent in any State will be more properly noticed in considering the international and *quasi*-international laws of the United States, or, in other words, the laws which in each State apply to persons known as aliens, either to the State alone or to the State and the United States, that is, *foreign* and *domestic* aliens, according to the phraseology herein before adopted for convenience of distinction.<sup>2</sup>

§ 539. In making this summary of legislative and constitutional provisions, it will not be attempted to show in what civil or social *liberty* consists in each State or local jurisdiction of the United States. Determined as it is by the existence of a variety of relations, it could only be described under a comprehensive view of all individual and relative rights under private law and the guarantees for their maintenance in the public law. Neither is it intended to give a summary view or description of *slavery*, as contrasted with a free condition under the common law of England or of the United States, either as a condition of personal bondage, bondage of a legal person, or as a chattel condition. The purpose in view will be to present the existence or non-existence, and the juridical modification, extension, or restriction, in each State or several local jurisdiction of the United States, of those two systems of personal laws, the origin and existence of which, in those colonies of the British empire which

<sup>1</sup> *Ante*, §§ 97-101.

<sup>2</sup> *Ante*, § 384.

now constitute a portion of the American Union, have been considered in the former part of this work, so far as that may be accomplished by describing the *legislative* action of the possessors of sovereign power, affecting the enjoyment of so called "personal rights," and by noting in connection the leading judicial decisions in cases arising under such legislation, or in which important doctrines of common law affecting those rights are prominently declared. And whether as an effect of local or *State* law, or as one of the *national* law of the United States, the subject of free condition and its contraries will, throughout, be in this work regarded exclusively as a topic of jurisprudence, or in the purely legal point of view, entirely distinct from all ethical and political considerations.

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